(1) 03 484 SEP 29 2003

No. _____

In The
Supreme Court of the United States

CAMPUS COMMUNICATIONS, INC.,

Petitioner,

v.

TERESA EARNHARDT, THE ESTATE OF DALE EARNHARDT, DALE EARNHARDT, JR., TAYLOR EARNHARDT, DALE EARNHARDT, INCORPORATED, COUNTY OF VOLUSIA, OFFICE OF THE MEDICAL EXAMINER, THE STATE OF FLORIDA, AND MICHAEL URIBE,

Respondents.

On Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, Fifth District

PETITION FOR A WRIT OF CERTIORARI

THOMAS R. JULIN
Counsel of Record
D. PATRICIA WALLACE

HUNTON & WILLIAMS LLP
Mellon Financial Center
1111 Brickell Avenue – Suite 2500
Miami, FL 33131
(305) 810-2516

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

94 pp

QUESTIONS PRESENTED

In *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999), a majority of the Justices stated that a government agency cannot constitutionally condition access to public records on the viewpoint of the requester. The questions presented are:

1. Was a state court decision denying access to Dale Earnhardt's autopsy photographs for certain speech purposes an invalid restriction upon speech, rather than a valid restriction on access to government held information?

2. Is a statute that restricts, on the basis of viewpoint, both viewing and copying of a broad category of traditionally open government records unconstitutionally overbroad because the viewing restriction does not serve a compelling governmental interest?

PARTIES TO THE PROCEEDING & CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption. Campus Communications, Inc. is a not-for-profit corporation. Therefore there is no parent or publicly held company owning 10% or more of Campus Communications, Inc.'s stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING & CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
CITATIONS OF THE OPINIONS AND ORDERS IN THE CASE	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	14
I. The State Court Decision Approves Restricting Public Record Access in Derogation of this Court's Decisions	14
A. The Order Unconstitutionally Denied Access on the Basis of Viewpoint & Disclosure of Editorial Process	14
B. The Order Denied Access to Records That Had Been Public at the Time of the Request	19
II. The State Court Decision Approves a Facially Invalid Statute That is Being Championed as a Model for Restricting Access to Public Records	21
A. The Statute Conditions Access on the Content of Prior Publication, Viewpoint & Disclosure of Editorial Process	23

TABLE OF CONTENTS – Continued

Page

B. The Exemption Removes Traditionally Open Records from Public View Without Sufficient Justification 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Ackerley Communications v. City of Somerville, 878 F.2d 513 (1st Cir. 1989) 25

American Railway Express Co. v. Levee, 263 U.S. 19 (1923) 1

Anderson v. Cryovac, 805 F.2d 1 (1st Cir. 1986) 12

Anderson v. Edwards, 514 U.S. 143 (1995) 24

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) 16

Board of County Commissioners v. Umbehr, 518 U.S. 668 (1996) 15

Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853 (1982) 20

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 29

Campus Communications, Inc. v. Earnhardt, 821 So. 2d 388 (Fla. 5th DCA 2002) 1, 13, 28

Dombrowski v. Pfister, 380 U.S. 479 (1965) 24

Earnhardt v. Volusia County, Officer of the Medical Examiner, No. 2001-30373-CICI, 2001 WL 992068 (Fla. 7th Cir. July 10, 2001) 1

Favish v. Office of the Independent Counsel, 37 Fed. Appx. 863, Nos. 01-55487/55788/55789, 2002 WL 1269348 (9th Cir. June 6, 2002), *cert. granted*, 123 S. Ct. 1928 (May 5, 2003) (No. 02-954) 22, 26, 27

Good News Club v. Milford Central School, 121 S. Ct. 2093 (2001) 12

Gooding v. Wilson, 405 U.S. 518 (1972) 24

TABLE OF AUTHORITIES – Continued

Page

Los Angeles Police Department v. United Reporting Publishing Corp., 528 U.S. 32 (1999) ..... *passim*

Lamb's Chapel v. Center Morishes Union Free School District, 508 U.S. 384 (1993) 16

Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001) 12, 26

Mansfield v. State, 758 So. 2d 636 (Fla. 2000) 17

National Endowment of the Arts v. Finley, 524 U.S. 569 (1998) 12, 16, 24

Nixon v. Administrator of General Services, 433 U.S. 425 (1977) 19

Pacific Gas & Electric Co. v. Public Utility Commission, 475 U.S. 1 (1986) 16

Palm Beach Newspapers, Inc. v. Terlizzesse, 6 Fla. Supp. 2d 8 (Fla. 15th Cir. 1984), *aff'd sub nom. Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775 (Fla. 4th DCA 1985) 2

Paul v. Davis, 424 U.S. 693 (1976) 19

Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819 (1995) 12, 16

Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) 16

Speiser v. Randall, 357 U.S. 513 (1958) 25

Straight v. State, 397 So. 2d 903 (Fla. 1981) 17

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) 24

TABLE OF AUTHORITIES – Continued

Page

United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) 26

United States v. American Library Association, 123 S. Ct. 2297 (2003) 19, 20, 26

Watchtower Bible & Tract Society v. Village of Stratton, 536 U.S. 150 (2002) 25

Whalen v. Roe, 429 U.S. 589 (1977) 19

Women's Emergency Network v. Bush, 323 F.3d 937 (11th Cir. 2003) 27

STATUTES

5 U.S.C. § 552(b)(7) 22

28 U.S.C. § 1257(a) 1

Fla. Stat. § 406.135(1) (2002) 27

Fla. Stat. § 406.135(2) (2002) 4, 27

Ch. 5942, Laws of Florida (1909) 2

Ch. 61-2640, Laws of Florida 2

Ch. 70-232, Laws of Florida 2

Ch. 2001-1, Laws of Florida ..... *passim*

N.C. House Bill 645 22

OTHER AUTHORITIES

American Society of Newspaper Editors, *Statement of Principles*, http://www.asne.org/kiosk/archive/principl.htm 25

TABLE OF AUTHORITIES – Continued

Page

Amicus Brief of Teresa Earnhardt, *Favish v. Office of the Independent Counsel*, 123 S. Ct. 1928 (May 5, 2003) (No. 02-954) 22, 23, 26, 27, 28

Center for Democracy & Technology, *A Quiet Revolution in the Courts: Electronic Access to State Court Records – A CDT Survey of State Activity and Comments on Privacy, Cost, Equity and Accountability*, http://www.cdt.org/publications/020821courtrecords.shtml (visited Sept. 19, 2003) 23

CNN.com, *U.S. Releases Photos Said To Show Saddam's Sons' Bodies*, http://www.cnn.com/2003/WORLD/meast/07/24/sprj.irq.sons/ (posted July 24, 2003) 28

Fish, Mike, *End of an Era – Earnhardt's Death High Price for Fans' Excitement*, http://sportsillustrated.cnn.com/motorsports/2001/daytona500/news/2001/02/18/nascar_earnhardt_dies/ (posted Feb. 18, 2001) 18

Hinton, Ed, *NASCAR Idles While Drivers Die*, Orlando Sentinel (Feb. 11, 2001) 9

Hinton, Ed, *Safety Slow To Arrive Despite Race Carnage*, Orlando Sentinel (Feb. 13, 2001) 9

Hinton, Ed, *NASCAR Drivers Want Own Medical Staff*, Orlando Sentinel (Feb. 13, 2001) 9

Hinton, Ed, *NASCAR Tells Drivers To Use Head-And-Neck Devices*, Orlando Sentinel, http://www.orlandosentinel.com/news/local/orl-asec-nascar101801,0,7723996.story?coll=orl-home-headlines (posted Oct. 18, 2001) 21

TABLE OF AUTHORITIES – Continued

Page

Housedems.com, *House Unanimously Approves Gleason's Autopsy Photo Release Ban*, http://www.housedems.com/preview.cfm?repID=109&articleID=2176 (released Apr. 14, 2003) 23

Larson, Susan, *Public Access to Electronic Court Records & Competing Privacy Interests*, http://www.judgelink.org/Insights/2001/E-Records/ (visited Sept. 19, 2003) 23

NBC17.com, *Peterson's Sister Wants No Autopsy Photo Restrictions*, http://www.nbc17.com/print/2023951/detail.html?use=print (posted Mar. 6, 2003) 22

Petitioner's Brief, *Favish v. Office of the Independent Counsel*, 123 S. Ct. 1928 (May 5, 2003) (No. 02-954) 26, 28

Society of American Business Editors & Writers, *Code of Ethics*, http://www.sabew.org/sabewweb.nsf/LinksView/0A4808805267F1C486256BF2007FCF73 (visited Sept. 19, 2003) 25

Sullivan, Kathleen M., *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989) 15

Woodson, R. D. & Tannen, Ricki L., *Federal Constitutional Privacy & The Florida Public Records Law: Resolving the Conflict*, 33 U. Fla. L. Rev. 313 (1980) 19

CITATIONS OF THE OPINIONS AND ORDERS IN THE CASE

Campus Communications, Inc. v. Earnhardt, 821 So. 2d 388 (Fla. 5th DCA 2002) (App. 1), *pet. for rev. dismissed*, 848 So. 2d 1153 (Fla. July 1, 2003) (App. 47); *Earnhardt v. Volusia County, Officer of the Medical Examiner*, No. 2001-30373-CICI, 2001 WL 992068 (Fla. 7th Cir. July 10, 2001) (App. 28).

JURISDICTION

The District Court of Appeal of Florida, Fifth District, entered its judgment on July 12, 2002. Campus Communications, Inc. timely invoked the discretionary jurisdiction of the Florida Supreme Court to review the judgment on July 22, 2002. The Florida Supreme Court declined to exercise its discretionary jurisdiction on July 1, 2003. (App. 47). This Court has jurisdiction to review the judgment of the Fifth District Court of Appeal pursuant to 28 U.S.C. § 1257(a). *See Am. Ry. Express Co. v. Levee*, 263 U.S. 19 (1923).

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

U.S. Const., Amends. I & XIV; Fla. Stat. § 406.125 (2001). (App. 49).

STATEMENT OF THE CASE

Dale Earnhardt, one of the most famous racecar drivers in history, died in a crash in the final lap of the Daytona 500 on Sunday, February 18, 2001. (V9-1670-1696-¶ 75).[1]

In accordance with chapter 406, Florida Statutes, an agent of the medical examiner of Volusia County, Florida, conducted an autopsy on Earnhardt on Monday, February 19, 2001. (V9-1670-1696-¶ 92). Section 119.07(1)(a), Florida Statutes, required that the autopsy report and photographs taken during the autopsy be made available to the public for inspection and copying.[2]

Teresa Earnhardt commenced this action on Thursday, February 22, 2001, seeking a temporary and permanent injunction to stop Thomas Beaver, the medical examiner for Volusia County, Florida, from making photographs of the autopsy available to the public and the

---

[1] Citations by the notation (V___-___-¶ ___) are to the record below by volume, page range, and, paragraph number. Citations by the notation (T___-___) are to the trial transcript volume and page.

[2] Florida first enacted a Public Records Law in 1909. Ch. 5942, Laws of Florida (1909). No general privacy exemption nor any general autopsy record exemption has ever been enacted. The Legislature exempted autopsy records of some county medical examiners by special law, *see, e.g.*, s. 5, Ch. 61-2640, Laws of Florida, (Palm Beach County), but in 1970, the Legislature enacted s. 11, Ch. 70-232, Laws of Florida (codified as chapter 406, Florida Statutes), to govern medical examiners generally. It superseded special acts without including any exemptions for records created by medical examiners. *See Palm Beach Newspapers, Inc. v. Terlizzesse*, 6 Fla. Supp. 2d 8, 10 (Fla. 15th Cir. 1984) (ordering production of autopsy records relating to David Kennedy, son of the late Sen. Robert F. Kennedy), *aff'd sub nom. Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775 (Fla. 4th DCA 1985).

press. (V2-290-301). In support of her request for the temporary injunction, she asserted that disclosure of the autopsy photographs would violate "the right to privacy under the United States Constitution." (V3-487-488). The trial court entered an *ex parte* temporary injunction on the date that the lawsuit was filed, directing the medical examiner not to make the Earnhardt autopsy photographs available to the public. (V2-302-304).

After other members of the Earnhardt family and Dale Earnhardt, Inc. (referred to collectively with Teresa Earnhardt as "the Earnhardts") appeared to support sealing the records (V2-347-49), and Sentinel Communications Company, publisher of the *Orlando Sentinel*, and Michael Uribe, operator of a website, appeared to oppose sealing the records (V2-315-317, V3-550-556, V4-747), the trial court referred the matter to mediation. (V4-750-51).

As the mediation was coming to a conclusion on March 16, 2001, Campus Communications, Inc., publisher of *The Independent Florida Alligator*, a newspaper in Gainesville, Florida, that had not participated in the mediation, moved to intervene to seek dissolution of the temporary injunction and dismissal of or summary judgment against the complaint. The motion alleged that Campus Communications had asked to inspect and copy the autopsy photographs pursuant to chapter 119, Florida Statutes, the Florida Public Records Law, and that the medical examiner had refused the request due to entry of the temporary injunction. (V5-771-803). The motion argued that the privacy right that the Earnhardts claimed under the federal Constitution could not block operation of the Florida Public Records Law. (V5-783-805). It also argued that any limitation on access based on the viewpoint of the

requester would "violate the First Amendment rights of the requester." (V5-793).

On that same day, March 16, 2001, the parties who had participated in the settlement – the *Sentinel*, additional intervening members of the press (V4-755-758), the medical examiner, and the Earnhardts – announced that they had reached an agreement whereby the mediator would appoint an independent expert to review the autopsy photographs and audiotapes and would report his findings. (V5-766-769). The agreement further provided that the photographs would be permanently sealed after the appointed expert had examined them. (V5-766-769). The circuit court approved the settlement on March 19, 2001. (V5-770).

Ten days later, on March 29, 2001, the Florida Legislature amended the Public Records Law through enactment of Chapter 2001-1, Law of Florida (codified as section 406.135, Florida Statutes), creating a general retroactive exemption to the Florida Public Records Law for autopsy photographs, videotapes, and audiotapes. The new law also created a mechanism by which anyone could apply to a state circuit court for access. In order to gain access under this mechanism, the law placed on the applicant the burden of demonstrating that he or she had "good cause" for such access.[3] The law did not provide any specific or objective definition of "good cause," but instead mandated judicial consideration of "whether such disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the

[3] Fla. Stat. § 406.135(2)(a) (2001).

family's right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form."[4]

On April 3, 2001, Campus Communications filed a supplemental memorandum (V5-890-933) and supplemental materials in support of its motion to intervene showing that autopsy photographs historically have played a critical role in press reports about murders, medical malpractice, prison deaths and numerous other public controversies. (V6-962-1162 & V7-1163-1311). In some instances, the press had found that medical examiners themselves had made serious errors in determining the cause of death or had engaged in wrongdoing or questionable practices. (V7-1163-1311 & Exs. 5-7, 9-10, 13, 15-17, 19, 22-51). The supplemental materials also demonstrated that the cause of Earnhardt's death had become a public controversy and that the photographs sought were relevant to that controversy. (V7-1163-1311 & Exs. 2, 4 & 8).

The supplemental memorandum argued that "Chapter 2001-1 is . . . invalid and unconstitutional under the First Amendment of the United States Constitution, both on its face and as applied to Campus Communications . . . in at least three respects. First, the statute purports to involve the judiciary in the editorial process. Second, the statute discriminates among speakers based upon the content of their speech. Third, the statute interferes with newsgathering." (V7-927). The memorandum further asserted that "Restrictions on access to governmental

---

[4] *Id.*

information, particularly information that has been traditionally open to the public, may not be imposed in the absence of compelling governmental interests." (V7-929).

On April 5, 2001, the circuit court granted Campus Communications' motion to intervene. (V7-1334). On April 16, 2001, Campus Communications filed a cross-claim against the medical examiner seeking an order under the Public Records Law requiring him to allow inspection and copying of the Earnhardt autopsy photographs. (V8-1359-1375). The State of Florida intervened to defend the constitutionality of Chapter 2001-1. (V8-1376-1379).

The medical examiner answered Campus Communications' complaint on May 2, 2001, admitting that the records sought by Campus Communications were public records and that they were not exempt from the disclosure requirements of that law at the time they had been requested, but asserting that he had been prevented from allowing access to the records by the temporary injunction that had been entered by the circuit court. (V8-1415-1417). The State answered the complaint on May 9, 2001, asserting that Chapter 2001-1 was constitutional. (V8-1452-1454).

The Court set the case for a bench trial to begin on June 11, 2001. Campus Communications submitted a trial memorandum that briefed the Court regarding the First Amendment and Equal Protection problems created by Chapter 2001-1. (V9-1719-1724).

In opening arguments, counsel for Campus Communications asserted:

> [Chapter 2001-1] abridges the First Amendment . . . in that it unjustifiably intrudes on the editorial

process of those who wish to have access to exempted records. And we know that because it has imposed this highly discretionary standard on those who may have access to the records. It has said, come in, show us that you have good cause, and if you do, you can have access to the records.

* * *

If the National [E]nquirer comes in, if the Globe comes in, if the New York Times comes in, if the Los Angeles Times comes in, . . . or if the Independent Florida Alligator comes in, there is nothing within the Statutes that says to the Judge you may not discriminate on the basis of the content of those particular publications or what they plan to do with the photographs.

Mr. Uribe [an intervenor] comes into court and says, I have good cause because I would like to use those photographs to demonstrate that racing is a hazardous activity and it results in deaths and I think people should be able to see the consequences of these deaths. How does the Court evaluate that type of claim? It evaluates it on the basis of the use to which he will put the photographs. The Court is not required to disclose those photographs simply upon a finding that disclosure of the photographs would inflict no harm. The Legislature might have done that, might have said to courts, if someone comes in, asks for the photographs and there is no showing that the release of the photographs would cause harm . . . then, Judge, you must release it. That would be a very different type of exemption.

* * *

> The Statute invites judges on its face to condition access on how those requesting the information are exercising a fundamental right, their First Amendment rights. What are you going to use the photograph for? That is prohibited. That type of statute is unconstitutional on its face.

(T1-30-34).

During the first day of the trial, the Court heard testimony from Thomas Beaver, the Volusia County medical examiner. Dr. Beaver testified that "it's important that we, as a society, know why people die, because . . . it helps us to identify risks to the society as a whole." (T2-200). He testified that historically his office had treated autopsy reports, including autopsy photographs, as public records and had released the reports and photographs upon the request of any member of the public for inspection and copying. (T2-202 & V9-1670-1696-¶ 35). He testified that he did not follow that practice in this case solely because of the temporary injunction entered by the circuit court. (T2-223).

According to Beaver, prior to this lawsuit, when a member of the public had asked to inspect or copy the autopsy records relating to a specific deceased person, that member of the public would be allowed to inspect and copy all autopsy records relating to the deceased person, including autopsy photographs, videotapes, and audiotapes. (V9-1670-1696-¶ 38). More than 50 members of the public had inspected and copied autopsy records maintained by Beaver within the 12-month period preceding February 22, 2001. (V9-1670-1696-¶¶ 39 & 40). Individuals who had copied autopsy photographs had not used them for harmful purposes. (V9-1670-1696-¶ 43).

Individuals who previously had asked for and obtained access to autopsy photographs included reporters, privately-employed medical doctors, privately-employed pathologists, privately-employed investigators, educators, medical researchers, sociologists, and acquaintances and relatives of the deceased (V9-1670-1696-¶ 45), and these individuals sometimes expressed disagreement with the conclusions of the medical examiner regarding the cause of death after they reviewed the photographs. (V9-1670-1696-¶ 48). Beaver himself had worked as a consultant in civil and criminal litigation and found it essential to review any autopsy photographs for that purpose. "[T]he first thing I ask the attorney for are the pictures," he testified. (T2-235).

Beaver admitted that in the week before Earnhardt died, the *Orlando Sentinel* had published a series of investigative reports highly critical of the National Association for Stock Car Auto Racing, Inc. ("NASCAR"), sponsor of the Daytona 500, for failing to require head and neck restraint systems that could prevent basilar skull injuries in high speed crashes. The articles reported that three NASCAR drivers had died in races in the previous nine months of head and neck injuries and that other racing organizations had required the use of head and neck restraint systems to prevent such injuries.[5]

---

[5] *See* Ed Hinton, *NASCAR Idles While Drivers Die*, Orlando Sentinel (Feb. 11, 2001) Ed Hinton, *Safety Slow To Arrive Despite Race Carnage*, Orlando Sentinel (Feb. 13, 2001); Ed Hinton, *NASCAR Drivers Want Own Medical Staff*, Orlando Sentinel (Feb. 13, 2001). (V9-1670-1696-¶¶ 68-70 & exhibits).

At the conclusion of the first day of the trial, the circuit court announced that it had found "that the legislative enactment of Chapter 2001-1 was a valid and constitutional exercise of legislative authority" under state constitutional provisions. (T2-281). The court ignored the arguments that the statute violated the First and Fourteenth Amendments. The court then invited Campus Communications to attempt to show that it had "good cause" for obtaining access to the photographs pursuant to the standards set forth in Chapter 2001-1. (T2-281).

In response to that invitation, Campus Communications chose not to offer any testimony from its reporters or editors. Instead, it offered testimony of Daytona Beach Police Department Sgt. Thomas Youngman, a police photographer (T3-323-351), Dr. Steve Bohannon (T3-352-399), Teresa Earnhardt (T4-406-482), and numerous newspaper articles. Collectively, the testimony and articles showed that the *Orlando Sentinel* had sharply criticized NASCAR in the week prior to Earnhardt's death for not requiring head and neck restraint systems for all drivers; that Bohannon, a NASCAR-employed doctor, announced that Earnhardt's fatal injuries were the type of injuries a head and neck restraint could have prevented; that the Volusia County medical examiner gave Bohannon access to the Earnhardt autopsy photographs shortly before entry of the temporary injunction; that after entry of the temporary injunction NASCAR, supported by Bohannon, publicly claimed that Earnhardt's death had been caused by seatbelt failure, rather than the lack of a head and neck restraint system; that the seatbelt manufacturer publicly claimed Earnhardt's seatbelt had not broken; and that an emergency medical technician who removed Earnhardt

from his car had publicly asserted that Earnhardt's seatbelt was intact after the crash.

Campus Communications urged the Court at least to make the photographs available for inspection so that it could attempt to determine for itself whether Earnhardt had died, as NASCAR contended, because his seatbelt broke or, as others contended, because NASCAR had failed to require drivers to wear head and neck restraint systems. (T5-556-575).

At the conclusion of the arguments, the trial judge orally announced that neither Campus Communications nor Uribe had shown good cause. The trial judge found that any bearing that the photographs might have on NASCAR's safety requirements could not constitute good cause for release because "that's a private matter that does not involve the Government at all." (T5-737). The written order (App. 28) was explicitly based on the viewpoint of the interveners and the content of Uribe's prior publications. "The intervener, Mr. Uribe," the order observed, "has already published autopsy photographs of Neil Bonnett and Rodney Orr, two racecar drivers who died in accidents at the Daytona International Speedway, on his web site, *websitecity.com*." (App. 33-¶ 15). The trial judge also noted:

> The hypotheses relating to NASCAR racing safety raised by the interveners do not meaningfully implicate governmental accountability. While there may be a number of *private* interests implicated, the suggestion of a controversy within NASCAR by the interveners certainly does not implicate a *governmental* interest. Those issues offered for the consideration of the court were thinly veiled excuses to gain access to the court either for the purpose of arguing the

> constitutionality of the statute or for making a profit at the expense of this family.

(App. 34-¶ 18). In both his oral rulings and written order, the trial judge ignored all the arguments that the First and Fourteenth Amendments prohibit denying access to public records on the basis of the requester's viewpoint.

After denial of a motion for new trial (App. 45), Campus Communications timely appealed the final judgment to the Fifth District Court of Appeal. (V16-2493-2494). On appeal, Campus Communications attacked the trial court's order as a viewpoint-based denial of access unsupported by compelling governmental interests. Specifically, it argued:

> Even if the state has no constitutional obligation to grant access, *see L.A. Police Dep't v. United Reporting Pub'g Corp.*, 120 S. Ct. 483 (1999), once it decides to grant access, it may not consistent with the First Amendment and Equal Protection Clause deny access to some on the basis of viewpoint. *Cf. Legal Servs. Corp. v. Velazquez*, 121 S. Ct. 1043, 1050 (2001) (government cannot condition subsidies on basis of viewpoint); *Good News Club v. Milford Cent. School*, 121 S. Ct. 2093 (2001) (exclusion of Christian children's club from meeting after hours was unconstitutional viewpoint discrimination); *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998) (NEA may not "leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints"); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (state university may not disburse student activity fees on viewpoint-based terms); *Anderson v. Cryovac*, 805 F.2d 1, 9 (1st Cir. 1986) ("danger in granting favorable [access]

> to certain members of the media is obvious: it allows the government to influence the type of substantive media coverage that public events will receive"). The court in the instant case expressly grounded its decision denying access, in part, on the viewpoint of the requesters that autopsy photographs under some circumstances should be published. (R. 2469-81 at 5-6) (referencing past and future publications of the requesters as justification for denying access). Both the order and Chapter 2001-1 abridge the First Amendment and deny equal protection by denying on the basis of viewpoint access to records made available to others.

(Appellant's Brief at 25 n.13).

The Fifth District Court of Appeal, like the trial court, ignored this argument, and upheld the trial court's judgment denying access to the records. *Campus Communications, Inc.*, 821 So. 2d 388 (App. 1). Also like the trial court, the Court of Appeal based its decision on Campus Communications' viewpoint that information contained in the photographs (but not necessarily the photographs themselves) should be published in the event that they showed that Earnhardt had died due to NASCAR's failure to require its drivers to use a head and neck restraint system. Specifically, the Court of Appeal found "that the safety requirements of NASCAR, a private entity, do not implicate the public's interest in evaluating governmental performance sufficient to release the photographs." 821 So. 2d at 402 (App. 25). The Court made no determination that this type of viewpoint discrimination served a compelling or even a substantial governmental interest and no determination that the denial of access had been narrowly tailored to serve such an interest. It certified to the Florida

Supreme Court, however, that the case had raised the broad question "IS SECTION 406.134 CONSTITUTIONAL?" *Id.* at 403 (App. 27). The Florida Supreme Court requested and received briefs on that question, but then decided not to exercise its discretion to review the decision. (App. 47).

REASONS FOR GRANTING THE WRIT

I.

The State Court Decision Approves Restricting Public Record Access in Derogation of this Court's Decisions

The decision of the District Court of Appeal applied Chapter 2001 in violation of the First and Fourteenth Amendments.

A. The Order Unconstitutionally Denied Access on the Basis of Viewpoint & Disclosure of Editorial Process

In *Los Angeles Police Department v. United Reporting Publishing Corp.*,[6] a majority of the Justices made clear that a state cannot constitutionally condition access to its records on the viewpoint of the requester. Justice Ginsburg, J., joined by Justices O'Connor, Souter and Breyer wrote: "California could not, for example, release address information only to those whose political views were in

[6] 528 U.S. 32 (1999).

line with the party in power."[7] Justice Stevens, joined by Justice Kennedy, observed: "As Justice GINSBURG points out, if the State identified the disfavored persons based on their viewpoint, or political affiliation, for example, the discrimination would clearly be invalid."[8] Justices Scalia and Thomas also acknowledged that even though a statute that merely denied access to records would impose no restrictions on speech, "it is an entirely different question whether a restriction upon access that *allows* access to the press (which in effect makes the information part of the public domain), but at the same time *denies* access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech rather than upon access to government information."[9]

The Court grounded these views on the "unconstitutional-conditions" doctrine[10] which holds that the government may not condition the grant of a benefit on the beneficiary's surrendering a constitutional right, even if the government may withhold that benefit altogether.[11] The government cannot "leverage its power to award

---

[7] *Id.* at 43 (Ginsburg, J., concurring, joined by O'Connor, Souter & Breyer, JJ.).

[8] *Id.* at 45-46 (Stevens, J., dissenting, joined by Justice Kennedy).

[9] *Id.* at 41 (Scalia, J., concurring, joined by Thomas, J.).

[10] *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989).

[11] *See, e.g., L.A. Police Dep't v. United Reporting Pub'g Corp.*, 528 U.S. 32, 43 (Ginsburg, J.) (citing *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996)) (First Amendment prohibited firing of county contractor based on his expressed political views).

subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints."[12]

Chapter 2001-1, Laws of Florida, explicitly allowed trial judges to do just that when it simultaneously exempted autopsy photographs from disclosure under the Public Records Law and allowed access to those who could show "good cause" for allowing access. The Legislature did not define "good cause." Instead, it provided a list of factors for courts to consider in deciding whether good cause had been shown. The courts below interpreted the statute as requiring them to condition access on the purpose for which Campus Communications sought access. They weighed the fact that Campus Communications had sought access primarily for the purpose of questioning the accuracy of NASCAR's public statements and found that not to be good cause.

The courts noted that the statute required them to consider whether disclosure was sought to evaluate

---

[12] *Nat'l Endowment of the Arts v. Finley*, 524 U.S. 569, 587 (1998) (citations omitted); *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (state university may not disburse student activity fees on viewpoint-based terms); *Lamb's Chapel v. Center Morishes Union Free Sch. Dist.*, 508 U.S. 384 (1993) (after-hours access to public school property cannot be withheld on the basis of viewpoint); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (different taxation of newspapers prohibited); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1 (1986) (government-required access to public utility's billing envelopes must not be viewpoint based). A law granting a judge standardless discretion to impose conditions on the release of public records is unconstitutional. *Cf. Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969) ("a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, and definite standards to guide the licensing authority, is unconstitutional").

governmental performance and concluded that Campus Communications' stated purpose in seeking access – to evaluate the accuracy of the autopsy report and law enforcement investigations of the accident – was not its true purpose. (App. 24-26 & 41). The trial court found that access had been sought "either for the purpose of arguing the constitutionality of the statute or for making a profit at the expense of this family" and concluded that neither of these purposes could justify granting access to the photographs. (App. 35). The record is clear that the courts below denied any access to the photographs because they found that Campus Communications' purpose for seeking access – its viewpoint – could not be characterized as "good cause."[13]

Neither the Earnhardts nor the State attempted to argue that denying access on the basis of viewpoint would serve any compelling governmental interest or that such a denial would be narrowly tailored to serve any such interest. They did argue and the courts found that allowing access to the photographs would harm the Earnhardts'

---

[13] The courts also found that the photographs would not provide any information about the cause of death beyond that in the autopsy report. Whether that is correct obviously can be determined only from a review of the photographs. The Florida Supreme Court, consistent with Dr. Beaver's testimony that "the first thing I ask the attorney for are the pictures," repeatedly has recognized that autopsy photographs have unique evidentiary value that cannot be supplanted by written reports or testimony. *See, e.g., Mansfield v. State*, 758 So. 2d 636, 648 (Fla. 2000) (holding trial court did not abuse discretion in admitting photographs depicting mutilation of victim's genitalia where relevant to medical examiner's determination of manner of victim's death); *Straight v. State*, 397 So. 2d 903 (Fla. 1981) (affirming conviction where gruesome photographs were admitted over defendant's objection that he would stipulate to the facts).

asserted privacy rights and in doing so both the trial and appellate courts rejected the suggestion of Campus Communications that its journalistic purposes could be served and the Earnhardts' privacy could be protected simply by prohibiting copying of the photographs while still allowing viewing at the medical examiner's office. (App. 25 & 35-¶ 20). That solution would have preserved the practical obscurity that autopsy photographs have had for decades, but both courts noted that Mrs. Earnhardt testified that she would be disturbed simply by knowing that others could view the photographs. The courts held that even this type of harm outweighed the disfavored purpose of questioning the public statements of NASCAR, a private entity, regarding the cause of Earnhardt's death. No court, however, has held that the government has a compelling interest in preventing this type of minimal disturbance generally and there clearly was no compelling interest in doing so here. Dale Earnhardt was one of the most public of celebrities. He chose to participate in and he and his family benefited from a sport that regularly produces fatalities. His death occurred before a crowd of more than 200,000 and a national television audience.[14] Extensive details concerning the cause of Earnhardt's death already had been made public through release of the autopsy report. Family "privacy interests" in blocking press inspection of autopsy photographs are certainly at their nadir here and no state or federal disclosural privacy right

---

[14] *See* Mike Fish, *End of an Era – Earnhardt's Death High Price for Fans' Excitement*, http://sportsillustrated.cnn.com/motorsports/2001/daytona500/news/2001/02/18/nascar_earnhardt_dies/ (posted Feb. 18, 2001).

exists.[15] The order therefore applied Chapter 2001-1 to deny access in violation of the First and Fourteenth Amendments.[16]

B. The Order Denied Access to Records That Had Been Public at the Time of the Request

In *United States v. American Library Association*, 123 S. Ct. 2297, 2310 (2003), four members of this Court agreed that a federal statute requiring public libraries to filter Internet materials to protect young library users from obscenity and child pornography must be subjected to strict or intermediate scrutiny.[17] Four members of the

---

[15] *See Whalen v. Roe*, 429 U.S. 589 (1977) (rejecting claim that rights would be violated by a centralized computer filing system for medical records maintained by government agency); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977) (archivists' review of tapes made during Nixon presidency to sort out personal matter would not violate Nixon's claimed privacy right); *Paul v. Davis*, 424 U.S. 693 (1976) (officials did not violate claimed privacy right by distributing flyers identifying plaintiff as shoplifter); Art. I, § 23, Fla. Const. (right of privacy "shall not be construed to limit the public's right of access to public records and meetings as provided by law"); R. D. Woodson & Ricki L. Tannen, *Federal Constitutional Privacy & The Florida Public Records Law: Resolving the Conflict*, 33 U. Fla. L. Rev. 313, 337 (1980) ("privacy amendment" may not be used "to impede public access to public information") (footnotes omitted).

[16] The majority in *United Reporting*, 528 U.S. at 40, declined to address the petitioner's as applied attack because it "did not attempt to qualify." Campus Communications, by contrast, applied for access in accordance with the procedures of the statute.

[17] *See United States v. Am. Library Ass'n*, 123 S. Ct. 2297, 2310 (2003) (Breyer, J., concurring) (restriction on access to materials in public library "calls for heightened, but not 'strict,' scrutiny"); *id.* at 2312, 2316 (Stevens, J., dissenting) ("An abridgement of speech by means of a threatened denial of benefits can be just as pernicious as an abridgment by means of a threatened penalty"; *id.* at 2318, 2324

(Continued on following page)

Court expressed the opposite view that such decisions should be subject to rational basis analysis only.[18] Justice Kennedy had no need to decide the appropriate level of scrutiny because he found that the statute at issue served a compelling governmental interest and that the plaintiffs had not shown that imposition of the filter would deny adults access to protected materials, so the statute would survive strict scrutiny analysis.[19] "If some libraries do not have the capacity to unblock specific Web sites or to disable the filter," Justice Kennedy added, "or if it is shown that an adult user's election to view constitutionally protected Internet materials is burdened in some other substantial way, that would be the subject for an as-applied challenge, not the facial challenge made in this case."[20]

This as-applied challenge to the order denying access to public records presents an opportunity to determine the appropriate level of scrutiny applicable to governmental action that removed information from a library of a different type – the library of open governmental records – after the records were requested. Petitioner submits that strict scrutiny is appropriate and that the decision to remove the Earnhardt photographs from public view cannot survive

---

(Souter, J., dissenting, joined by Ginsberg, J.) (removal of material already on the shelves when scarcity of resources is not an issue is subject to "conventional strict scrutiny").

[18] *Id.* at 2298 (Rehnquist, C.J., announcing the judgment of the Court, joined by O'Connor, Scalia & Thomas, JJ.).

[19] *Id.* at 2309 (Kennedy, J.). *See also Bd. of Ed., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U. S. 853, 870-71 (1982) (plurality opinion).

[20] *Am. Library Ass'n*, 123 S. Ct. at 2310 (Kennedy, J., concurring).

such scrutiny because there was no compelling governmental interest in doing so – or at least no compelling interest in prohibiting the mere *inspection* of them. The statute served only to protect the Earnhardt family from knowing that others would see the photographs while it blocked journalists from obtaining information that could have saved at least one life.[21]

II.

The State Court Decision Approves a Facially Invalid Statute That is Being Championed as a Model for Restricting Access to Public Records

Review also should be granted because Chapter 2001-1 has become a model for states to restrict access to public records on the basis of viewpoint and it has been cited by both Mrs. Earnhardt and the Solicitor General of the United States to this Court in *Favish v. Office of the Independent Counsel*, No. 02-954, *cert. granted*, 123 S. Ct. 1928 (May 5, 2003), as a model for interpreting the federal Freedom of Information Act. Chapter 2001-1 is facially invalid by virtue of (A) its denial of access to journalists

[21] Four months after the trial court order, Blaise Alexander, a driver for the Automobile Racing Club of America, which is closely allied to NASCAR, died of a basilar skull injury in a crash on Oct. 4, 2001, at Lowe's Motor Speedway in Concord, North Carolina, making him the sixth stockcar driver to die of this type of injury in 17 months. Two weeks thereafter, NASCAR ordered all of its drivers to begin using head and neck restraint systems. *See* Ed Hinton, *NASCAR Tells Drivers To Use Head-And-Neck Devices*, Orlando Sentinel, http://www.orlandosentinel.com/news/local/orl-asec-nascar101801,0,7723996.story?coll=orl-home-headlines (posted Oct. 18, 2001).

engaged in confidential investigations of government wrongdoing, and (B) its closure of traditionally open public records on the basis of content without sufficient justification.

The Court has granted a writ of certiorari to review *Favish v. Office of the Independent Counsel*, 37 Fed. Appx. 863, Nos. 01-55487/55788/55789, 2002 WL 1269348 (9th Cir. June 6, 2002), *cert. granted*, 123 S. Ct. 1928 (May 5, 2003) (No. 02-954), a decision that interprets 5 U.S.C. § 552(b)(7)(C), as not prohibiting disclosure of post-mortem photographs of Vince Foster. As amicus curiae in support of the petitioner in *Favish*, Mrs. Earnhardt points out that in the two years since her husband's death, she "has become a national spokeswoman for families like hers: families who lose a loved one through a tragedy that triggers the involvement of some governmental agency" and that her "particular focus has been on the inspection, copying, and republication, by print and electronic press and on the internet, of autopsy photographs."[22] Her brief contends that "[m]ost states now restrict public access to autopsy photographs,"[23] and it shows that her success in litigation in Florida has tempted other states to condition access to public records on the ability of the requester to demonstrate "good cause."[24] Mrs. Earnhardt observes in

---

[22] Amicus Brief of Teresa Earnhardt at 1-2, *Favish*, 123 S. Ct. 1928 (hereinafter "Earnhardt Amicus Brief in *Favish*").

[23] *See* App. to Earnhardt Amicus Brief in *Favish* (describing autopsy record access laws in many states).

[24] *See, e.g.*, N.C. House Bill 645 (described in Earnhardt's Appendix as allowing access on the basis of "good cause"); NBC17.com, *Peterson's Sister Wants No Autopsy Photo Restrictions*, http://www.nbc17.com/print/2023951/detail.html?use=print (posted Mar. 6, 2003) (describing

(Continued on following page)

Favish that "Even courts are increasingly concerned about the amount of sensitive information about individuals filed with courts and then widely publicly disseminated," citing recent work by the U.S. Judicial Conference and the Florida Supreme Court.[25] These arguments underscore the importance of granting a writ of certiorari to guide legislators and judges who are evaluating how to regulate access to autopsy photographs and many other public records in the Internet era.[26] If the decision of the Fifth District Court of Appeal is left unreviewed, it threatens to inspire widespread imposition of unconstitutional restrictions on access to public records.

A. The Statute Conditions Access on the Content of Prior Publication, Viewpoint & Disclosure of Editorial Process

"[W]hen statutes regulate or proscribe speech . . . the transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on

---

North Carolina Legislature's consideration of legislation similar to the Florida law); Housedems.com, *House Unaimously Approves Gleason's Autopsy Photo Release Ban*, http://www.housedems.com/preview.cfm?repID=109&articleID=2176 (released Apr. 14, 2003) (describing Michigan House vote).

[25] Earnhardt Amicus Brief in *Favish* at 15.

[26] The debate is even more widespread than Mrs. Earnhardt shows. *See, e.g.*, Center for Democracy & Technology, *A Quiet Revolution in the Courts: Electronic Access to State Court Records – A CDT Survey of State Activity and Comments on Privacy, Cost, Equity and Accountability*, http://www.cdt.org/publications/020821courtrecords.shtml (visited Sept. 19, 2003); Susan Larson, *Public Access to Electronic Court Records & Competing Privacy Interests*, http://www.judgelink.org/Insights/2001/E-Records/ (visited Sept. 19, 2003).

overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with requisite narrow specificity.'"[27] "This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their right for fear of criminal sanctions provided by a statute susceptible of application to protected expression."[28] The Court also has allowed facial challenges to statutes that could be used to condition subsidies on viewpoint.[29]

By placing a burden on the requester to show "good cause," the statute here allows courts to deny access on the basis of prior publication of the requester, the viewpoint of the requester, the unwillingness of the requester to expose the nature of its investigation of the government, or findings that are based entirely on one-sided arguments of government officials or others who themselves have access to the records but wish to keep the public records secret.

The trial judge below considered that Michael Uribe previously had published autopsy photographs on his Internet website.[30] As discussed above, he also explicitly

---

[27] *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

[28] *Gooding*, 405 U.S. at 520-21.

[29] *See, e.g. Finley*, 524 U.S. 569 (entertaining a facial challenge to a public funding scheme); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997) (entertaining a landowner's facial challenge to a local redevelopment plan); *Anderson v. Edwards*, 514 U.S. 143 (1995) (entertaining facial challenge to state restructuring of welfare benefits).

[30] It is "without question" that the government may not deny a benefit as a penalty for "a person's constitutionally protected past

(Continued on following page)

interpreted the statute as allowing consideration of the purpose for which the photographs had been requested. The appellate court approved both inquiries and this resulted in the unconstitutional denial of access on the basis of the requesters' viewpoint. While some such denials can be reviewed and corrected, as here, on a case-by-case basis, in many instances journalists cannot disclose the nature of their investigations or the sources that have given them good cause for wanting to inspect public records without compromising their investigations.[31] They will lose access to records that others are permitted to inspect and copy solely because they are engaged in protected newsgathering activities. Facial invalidation of such a statute is appropriate because it imposes an unconstitutional burden on the exercise of First Amendment rights[32] and unconstitutionally distorts the proper functioning of

---

speech." *Ackerley Communications v. City of Somerville*, 878 F.2d 513, 519 (1st Cir. 1989) (citing *Speiser v. Randall*, 357 U.S. 513, 518 (1958)).

[31] *See, e.g.*, American Society of Newspaper Editors, *Statement of Principles*, Article VI, http://www.asne.org/kiosk/archive/principl.htm ("Pledges of confidentiality to news sources must be honored at all costs, and therefore should not be given lightly") (visited Sept. 19, 2003); Society of American Business Editors & Writers, *Code of Ethics* ¶ 5, http://www.sabew.org/sabewweb.nsf/LinksView/0A4808805267F1C486256BF2007FCF73 (visited Sept. 19, 2003) ("Make every effort to insure the confidentiality of information held for publication to keep such information from finding its way to those who might use it for gain before it becomes available to the public").

[32] *Cf. Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 167 (2002) (imposition of registration requirement on door-to-door canvassers is facially invalid because "there are a significant number of persons whose religious scruples will prevent them from applying for such a license").

the Public Records Law by conditioning access on disclosure of the editorial process.[33]

In *Favish*, Mrs. Earnhardt asserts that Chapter 2001-1, Laws of Florida, "prohibits the inspection and copying of [autopsy] photographs absent a showing of good cause [and that t]he issues involved in balancing these rights are similar to those involving Exemption 7(C)."[34] In fact, Exemption 7(C) is highly distinct from Chapter 2001-1, Laws of Florida, and provides a good example of legislation that does not allow consideration of the content of the requester's point of view and that is therefore constitutional. In *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 771 (1989), the Court explicitly held:

> whether an invasion of privacy is *warranted* cannot turn on the purposes for which the request for information is made. Except for cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege, the identity of the requesting party has no bearing on the merits of his or her FOIA request.

---

[33] *Cf. Legal Servs. Corp. v. Velazquez*, 531 U. S. 533, 543 (2001) (when "the Government seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning," the distorting restriction must be struck down under the First Amendment); *see also Am. Library Ass'n*, 123 S. Ct. at 2317 (2003) (Stevens, J., dissenting) ("requiring the filtering software on all Internet-accessible computers distorts that medium").

[34] Earnhardt Amicus Brief in *Favish* at 2-3, *Favish*, 123 S. Ct. 1928 (footnote omitted); *see also* Appellant's Brief at 24-25, *Favish*, 123 S. Ct. 1928.

The Court further held that requests for records under the FOIA must be resolved "without regard to individual circumstances." *Id.* at 780. Consistently, Mrs. Earnhardt argues in *Favish* that Exemption 7(C) should not be interpreted as allowing the purpose of the request to be considered. She asserts that the "Court would be justified in considering [Exemption 7(C)] a categorical exemption from the FOIA for all post-mortem photographs."[35] While petitioner does not agree that Exemption 7(C) categorically applies to all post-mortem photographs, it does agree that Exemption 7(C) is categorical in that it does not require a determination of whether the requester has shown "good cause." If interpreted otherwise, Exemption 7(C) could be used to distort the usual operation of FOIA by offering government records as a prize to those who conform their views and use of records to the government's preferences and that would render Exemption 7(C) vulnerable to the same constitutional attack made on Chapter 2001-1 here.

It is critical for this Court to make clear in this case, as the majority did in *United Reporting* and as Congress did when it enacted FOIA, that control over access to public records may not be leveraged to coerce or to suppress a particular viewpoint.[36]

---

[35] Earnhardt Amicus Brief in *Favish* at 29.

[36] That portion of Chapter 2001-1 that provides judges discretion to discriminate based on improper factors is now codified as Fla. Stat. § 406.135(2)(a) (2002). Invalidation of that subsection alone would leave the exemption created by Fla. Stat. § 406.135(1) (2002) in place, but chapter 2001-1 does not contain a severability clause and it cannot be "'said that the Legislature would have passed the one without the other.'" *Women's Emergency Network v. Bush*, 323 F.3d 937, 949 (11th

(Continued on following page)

B. The Exemption Removes Traditionally Open Records from Public View Without Sufficient Justification

After the Solicitor General's citation and discussion of the instant case in his brief for the petitioner in *Favish*, he makes the assertion that "there is no broadly recognized tradition in the United States of public access to autopsy or crime-scene photographs or similar depictions of individuals immediately prior to or in the throes of their death." Petitioner's Brief in *Favish* at 26. In fact, autopsy and other post-mortem records in government hands, including photographs, have been routinely available to the public and press for inspection in Florida since enactment of the Public Records Law in 1909.[37] The record below shows that reporters and others regularly have used that access for a variety of purposes such as uncovering medical examiners' negligence or criminal activities. Chapter 2001-1 not only prohibits access to the Earnhardt photographs, but also effectively ends this historical access to thousands of other autopsy photographs available to the

---

Cir. 2003) (citation omitted). These and other factors require invalidation of chapter 2001-1 in its entirety. Even if section 406.135(2)(a) could be severed, severance would render Chapter 2001-1 violative of article I, section 24(c), Florida Constitution. *See Campus Communications, Inc.*, 821 So. 2d at 394.

[37] *See* note 1 *supra*. The United States also makes autopsy and post-mortem photographs available. *See, e.g.*, Letter from National Archives & Records Administration stating autopsy photographs of Lee Harvey Oswald and Jay Tippett are open for viewing and available for reproduction (T2 & Ex. 58); CNN.com, *U.S. Releases Photos Said To Show Saddam's Sons' Bodies*, http://www.cnn.com/2003/WORLD/meast/07/24/sprj.irq.sons/ (posted July 24, 2003). *See also* App. to Earnhardt Amicus Brief in *Favish* at 20-23 (listing seven state laws which make autopsy records open).

public. The Florida Legislature's decision to remove autopsy photographs from public view is directly analogous to a governmental decision to remove thousands of books from public library shelves because the government believes that the contents of the books are no longer suitable for the public.

Removal of all autopsy photographs from public view cannot survive such scrutiny because there is no compelling governmental interest in doing so, as is demonstrated by the nine decade history of allowing access to such photographs during which access caused no serious harm to anyone. Moreover, even assuming that restricting access to some photographs serves a compelling governmental purpose, restricting access to all autopsy photographs, including the photographs of individuals who have been deceased for decades and who have no living relatives, serves no purpose whatsoever. The sweep of this statute is far broader than its legitimate application, assuming that it has any legitimate application at all.[38] The statute's removal of historically open records from public view is therefore facially unconstitutional.

---

[38] *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: September 29, 2003

Respectfully submitted,

THOMAS R. JULIN
Counsel of Record for Petitioner
D. PATRICIA WALLACE
HUNTON & WILLIAMS LLP
1111 Brickell Avenue, Suite 2500
Miami, FL 33131
305.810.2516 Fax 1601
tjulin or pwallace@hunton.com
Attorneys for the Petitioner

821 So. 2d 388

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

JULY TERM 2002

CAMPUS COMMUNICATIONS, INC.,

Appellant/Cross-Appellee,

v. Case No. 5D01-2419

TERESA EARNHARDT, and the Estate of DALE EARNHARDT, by and through its Personal Representative, TERESA EARNHARDT, for and on behalf of the Estate and for the Survivors, et al.

Appellees/Cross-Appellants.
_____/

Opinion filed July 12, 2002

Appeal from the Circuit Court for Volusia County, Joseph G. Will, Judge.

Thomas R. Julin & D. Patricia Wallace of Hunton & Williams, Miami, for Appellant/Cross-Appellee.

Charles T. Canady, General Counsel, and Simone Marstiller, Assistant General Counsel, Executive Office of the Governor, Tallahassee, Amicus Curiae, for Governor Jeb Bush.

Jonathan D. Kaney, Jr. and Daniel R. Bischof of Cobb, Cole & Bell, Daytona Beach, Amici Curiae, for Florida Society of Newspaper Editors, First Amendment Foundation, Reporters Committee for Freedom of the Press, and Student Press Law Center.

E. Thom Rumberger and Ernest H. Eubanks, Jr. of Rumberger, Kirk & Caldwell, P.A., Orlando, and Parker D. Thomson and Carol A. Licko of Hogan & Hartson, LLP, Miami, and Jon L. Mills and Timothy McLendon, Gainesville, and Dickson M. Lupo and Judson Graves of Alston & Bird, LLP, Charlotte, North Carolina, for Appellees/Cross-Appellants Teresa Earnhardt and the Estate of Dale Earnhardt, by and through its Personal Representative, Teresa Earnhardt, for and on behalf of the Estate and for the Survivors.

Thomas E. Warner, Solicitor General, and T. Kent Wetherell, II, Deputy Solicitor General, Office of the Solicitor General, Tallahassee, for Appellee/Cross-Appellant State of Florida.

Daniel D. Eckert, County Attorney, Deland, for Appellee/Cross-Appellant County of Volusia, Office of the Medical Examiner.

SAWAYA, J.

Campus Communications, Inc. (Campus) appeals the final judgment finding Chapter 2001-1, codified at section 406.135, Florida Statutes (2001), constitutional and retroactively applicable to the request made by Campus to view and copy the autopsy photographs of R. Dale Earnhardt.[1] We affirm.

---

[1] Campus is the sole Appellant. Its position was supported by the brief of amici curiae: the Florida Society of Newspaper Editors, the First Amendment Foundation, the Reporters Committee for Freedom of the Press, and the Student Press Law Center. The Appellees are Teresa Earnhardt, the Estate of Dale Earnhardt, Dale Earnhardt Jr., Taylor Earnhardt, Dale Earnhardt, Inc., the Volusia County Office of the

(Continued on following page)

Factual Background And Issues

Mr. Earnhardt was a famous and very successful race car driver who became involved in a fatal crash during the Daytona 500 race on February 18, 2001. He was taken to Halifax Medical Center where, sadly, life-saving efforts were unsuccessful. Mr. Earnhardt was pronounced dead on that same date.

An autopsy was performed on February 19, 2001, by an assistant to the Volusia County Medical Examiner in accordance with Florida law governing accidental deaths.[2] In performing the autopsy, thirty-three photographs were taken which, according to the uncontradicted testimony of the medical examiner, were not of "diagnostic quality" and were taken solely as a back-up to the dictation system utilized by the medical examiner to record his findings for inclusion in a written autopsy report.

The written autopsy report, post-crash photographs of Mr. Earnhardt's car, a toxicology report and a sketch showing the markings on Mr. Earnhardt's body were promptly made available to the public. The autopsy photographs, however, were not released because on

---

Medical Examiner, and the State of Florida. An amicus curiae brief was filed by Governor Jeb Bush supporting Appellees' position on the constitutionality of section 406.135. The cross-appeal filed by Appellees was abandoned.

[2] Section 406.11(1)(a)2., Florida Statutes (2001), provides that if a human being dies by accident in the State of Florida, the medical examiner of the district in which the death occurred or where the body is found "shall determine the cause of death and shall, for that purpose, make or have performed such examinations, investigations, and autopsies as he or she shall deem necessary or as shall be requested by the state attorney. . . ."

February 22, 2001, Mrs. Earnhardt sought and obtained an ex parte injunction precluding the medical examiner from releasing them. This injunction was obtained before any request for access to the photographs was made.

On February 23, 2001, the Orlando Sentinel newspaper requested the autopsy photographs. Michael Uribe, who operates a for-profit website on which he publishes celebrity autopsy photographs, also made a request for the photographs. Mr. Uribe had previously published the autopsy photographs of Neil Bonnett and Rodney Orr, both of whom were race car drivers killed in crashes at the Daytona International Speedway. Both requests were denied pursuant to the injunction.

The medical examiner, the Earnhardts and the newspaper interests represented by the Orlando Sentinel subsequently entered into a mediation agreement whereby they agreed that the photographs would be examined by an expert in biomechanics who would issue a report and, thereafter, the photographs would be permanently sealed. Neither Campus nor Mr. Uribe participated in the mediated settlement and on the same day the agreement was reached, Campus made its request for the photographs.

On March 29, 2001, the Florida Legislature enacted section 406.135, which was signed by Governor Bush and became effective on that same date. Upon passage of the statute, the Earnhardts amended their request to include permanent injunctive relief under the statute. Campus filed a cross-claim against the medical examiner seeking an order under the Public Records Act requiring the medical examiner to allow inspection and copying of the photographs. Trial subsequently commenced, evidence and testimony were presented, and the trial court rendered its

decision finding the statute constitutional and retroactively applicable to the requests made by Campus and Mr. Uribe.

The issues we are confronted with in the instant proceedings are 1) whether section 406.135 is overly broad and therefore unconstitutional; 2) whether the statute should be applied retroactively; and 3) whether the trial court erred in finding that Campus failed to establish good cause under the statute to allow inspection and copying of the photographs. We will proceed to address each issue in the order presented.

Constitutionality Of The Statute

General Principles and Legislative Findings

We begin our analysis with the generally accepted principle that "all laws are presumed constitutional" and "[t]he burden rests on the party challenging the law to show that it is invalid." *Chicago Title Ins. Co. v. Butler,* 770 So. 2d 1210, 1214 (Fla. 2000) (citations omitted). If any doubt exists as to the validity of a law, it must be resolved in favor of constitutionality where reasonably possible. *L.B. v. State,* 700 So. 2d 370 (Fla. 1997); *Department of Law Enforcement v. Real Prop.,* 588 So. 2d 957, 961 (Fla. 1991).

Both the Florida Constitution and the Public Records Act allow for the creation of exemptions to the Act by the Legislature, provided the newly enacted exemption 1) serves an identifiable public purpose and 2) is no broader than necessary to meet that public purpose. Art. I, § 24(c), Fla. Const.; § 119.15(4)(b), Fla. Stat. (2001). As to the first requirement, the Legislature must specifically state the public necessity which justifies the exemption. Art. 1,

§ 24(c), Fla. Const. In order to fulfill these constitutional and statutory requirements, the Legislature made the following findings:

> The Legislature finds that it is a public necessity that photographs and video and audio recordings of an autopsy be made confidential and exempt from the requirements of section 119.07(1), Florida Statutes, and Section 24(a) of Article I of the State Constitution. The Legislature finds that photographs or video or audio recordings of an autopsy depict or describe the deceased in graphic and often disturbing fashion. Such photographs or video or audio recordings may depict or describe the deceased nude, bruised, bloodied, broken, with bullet or other wounds, cut open, dismembered, or decapitated. As such, photographs or video or audio recordings of an autopsy are highly sensitive depictions or descriptions of the deceased which, if heard, viewed, copied or publicized, could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injury to the memory of the deceased. The Legislature notes that the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of autopsy photographs and video and audio recordings would subject the immediate family of the deceased to continuous injury. The Legislature further notes that there continue to be other types of available information, such as the autopsy report, which are less intrusive and injurious to the immediate family members of the deceased and which

> continue to provide for public oversight. The Legislature further finds that the exemption provided in this act should be given retroactive application because it is remedial in nature.

Ch. 2001-1, § 2, at 2, Laws of Fla.

We will address the specificity requirement first.

The Specificity Requirement

As to the requirement that the exemption serve an identifiable public purpose, the Legislature must "state with specificity the public necessity justifying the exemption." Art. I, § 24(c), Fla. Const. We find that chapter 2001-1, Laws of Florida, clearly satisfies this requirement. The legislative findings detail the graphic and often gruesome nature of such autopsy photographs and the trauma and emotional injury the immediate family of the deceased would likely suffer if these records were disclosed and disseminated to the public. The Legislature also recognizes the potential for exacerbation of such injury in light of the ever increasing use of the Internet and the proliferation of personal computers. These findings are supported by the evidence and testimony introduced in the proceedings before the trial court.

We need not address the specificity requirement any further because Campus does not forcefully challenge the Legislature's statement of public necessity. Rather, Campus focuses on the argument that the exemption is overly broad.

The Exemption Must Not Be Overly Broad

Campus contends that section 406.135 is unconstitutional because it is broader than necessary to meet the statute's public purpose. Specifically, Campus argues that the finding made by the Legislature that some photographs "may" show gruesome scenes and that trauma "could" result from publication of the autopsy photographs is explicit recognition that photographs are not always gruesome and that trauma does not always result from their viewing. Therefore, Campus asserts, the Legislature exempted more records than were necessary to serve the purpose of the statute.[3] We disagree that the statute is overly broad.

We find the scope of section 406.135 to be specific and narrow: it applies only to autopsy photographs and audio and video recordings of the autopsy. It does not apply to other records of the autopsy such as the written autopsy report and, therefore, those materials remain unrestricted public records. Moreover, in the instant case, the trial court found that there was no information that could be obtained from the autopsy photographs of Mr. Earnhardt that was not contained in the autopsy report which was published to the parties and the public.

---

[3] Campus raises two other arguments: 1) the statute is unconstitutional because immediate family members may object and keep the records from being disclosed while other family members may not object to disclosure; and 2) the exemption is overly broad because the Legislature could have avoided the publication issue by simply allowing inspection alone. We find these arguments have little merit and therefore affirm the trial court as to these issues.

Equally important, despite the fact that autopsy photographs and audio and video recordings are no longer considered unrestricted public records, is the inclusion of the good cause provisions which do allow the publication of these restricted records if the statutory criteria are established. *See* § 406.135(2)(a), Fla. Stat. (2001). Thus the fact that the Legislature used "may," "could" and "often" is not evidence that the exemption is overly broad, but rather a recognition that circumstances may exist which would justify disclosure of autopsy photographs and audio and video recordings upon a showing of good cause. Moreover, use of the absolute terminology advocated by Campus such as "would," "always" and "must" would foreclose the possibility that disclosure could be made even upon a showing of good cause.

We find *Bryan v. State,* 753 So. 2d 1244 (Fla.), *cert. denied,* 528 U.S. 1185 (2000), analogous to the instant case. In *Bryan,* the court analyzed a public records exemption provided in section 945.10(1)(e), Florida Statutes (1999), which exempted from disclosure records and information of the Department of Corrections "which if released would jeopardize a person's safety." The Legislature had justified the adoption of this exemption by stating that "it is a public necessity that the department records . . . remain confidential and exempt from public disclosure . . . because to provide otherwise would *in some cases* conflict with other existing law or would reveal information that would jeopardize the safety of the guards, inmates, and others." *Id.* at 1250 (emphasis supplied). The legislative findings in *Bryan* that disclosure of the information "in some cases" would jeopardize an individual's safety could be considered constitutionally infirm on the same grounds advanced by Campus in the instant case,

but the supreme court approved the exemption as being "supported by a thoroughly articulated public policy." *Id.* at 1251 (footnote omitted). Like the court in *Bryan*, we find the exemption provided in section 406.135 to be supported by a thoroughly articulated public policy and reject the argument that it is overly broad.

Campus next assails the "good cause" provision of the statute, protesting that the Legislature did not define this term.[4] We find that this argument lacks merit because the statute requires consideration of specific criteria to determine whether good cause has been shown. *See* § 406.135(2)(a), Fla. Stat. (2001). Moreover, good cause is not a novel concept to our jurisprudence. Florida courts have applied good cause provisions in a variety of contexts, including the Public Records Act. *See, e.g.*, § 119.07(7)(a), Fla. Stat. (2001); *Department of Health & Rehabilitative Servs. v. Gainesville Sun Publ'g Co.*, 582 So. 2d 725 (Fla. 1st DCA 1991). Therefore, the statute is not invalid

---

[4] Campus also argues that the good cause provision is an improper delegation to the judiciary of legislative authority. We reject this argument because the Legislature made the fundamental and primary policy declarations regarding disclosure of autopsy photographs and audio and video recordings of autopsies and has provided explicit and detailed guidelines and standards for the courts to apply in determining whether good cause has been established. *See Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978). Furthermore, acceptance of the delegation argument would make every other statute authorizing the courts to act upon a showing of good cause constitutionally suspect. *See, e.g.*, §§ 14.28, 39.202(5), 119.07(3), 240.2996(6), 288.075(2), 397.501(7)(a) 5., 828.30(5), 985.04(4)(a), 985.05(2), 985.212(1)(b), Fla. Stat. (2001).

because it fails to specifically define a term for which the courts already know the meaning.[5]

We find that section 406.135 serves an identifiable public purpose, is no broader than necessary to meet that public purpose and was enacted in accordance with the constitutional and legislative requirements we have previously discussed. The presumption of constitutionality has not been overcome by Campus. Therefore, we conclude that section 406.135 is constitutional. The next issue we must address is whether retroactive application of the statute is proper.

Retroactive Application

General Principles

When considering whether a statute should be retroactively applied, the courts should determine 1) whether there is clear evidence that the Legislature intended to apply the statute retrospectively; and 2) whether retroactive application is constitutionally permissible. *Metropolitan Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494 (Fla. 1999). The second inquiry is generally premised on a finding by the court that the Legislature has clearly expressed an intent that the statute apply retrospectively. *Id.*

---

[5] *See, e.g., Levine v. Kaplan*, 687 So. 2d 863, 865 (Fla. 5th DCA) (defining good cause, in the context of rule 1.420(e) of the Florida Rules of Civil Procedure, as "proof of some compelling reason" or "excusable conduct other than negligence") (citing *Bruns v. Jones*, 481 So. 2d 544 (Fla. 5th DCA 1986)), *review denied*, 697 So. 2d 511 (Fla. 1997), *disapproved of on other grounds, Metropolitan Dade County v. Hall*, 784 So. 2d 1087 (Fla. 2001).

The first inquiry poses a question of statutory construction and requires application of a legal presumption which provides that statutes, in the absence of clear legislative intent to the contrary, should apply prospectively. Legislative intent must be determined primarily from the language of the statute and "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v. Auld,* 450 So. 2d 217, 219 (Fla. 1984) (quoting *A.R. Douglass, Inc. v. McRainey,* 137 So. 157 (Fla. 1931)); *see also Rollins v. Pizzarelli,* 761 So. 2d 294, 297 (Fla. 2000); *Chase Federal,* 737 So. 2d at 500 ("Of course, where the language of a statute contains an express command that the statute is retroactive, there is no need to resort to these canons of statutory construction.") (citations omitted); (*Modder v. American Nat'l Life Ins. Co.,* 688 So. 2d 330, 333 (Fla. 1997).

In the instant case, the Legislature was clear in its intent, twice expressly stating that section 406.135 was to be applied retroactively. § 406.135(4), Fla. Stat. (2001) ("This exemption shall be given retroactive application."); Ch.2001-1, § 2, at 2, Laws of Fla. ("The Legislature further finds that the exemption provided in this act should be given retroactive application because it is remedial in nature."). Therefore, we should neither apply the general rules of statutory construction to the statute nor indulge the presumption in favor of prospective application. *See Arrow Air, Inc. v. Walsh,* 645 So. 2d 422, 425 (Fla. 1994) (stating that "[t]he presumption against retroactive application of a law that affects substantive rights . . . is a well established rule of statutory construction" that

"comes into play in the absence of an express statement of legislative intent.") (citations omitted). Hence we consider next whether retroactive application of section 406.135 is constitutionally permissible.

In instances where the Legislature clearly expresses the intent that a statute is to be given retrospective application, as in the instant case, the courts will refuse to apply the statute retroactively "if the statute impairs vested rights, creates new obligations, or imposes new penalties." *State Farm Mut. Auto. Ins. Co. v. Laforet,* 658 So. 2d 55, 61 (Fla. 1995) (citations omitted); *see also Chase Federal.* On the other hand, "[r]emedial . . . statutes do not fall within the constitutional prohibition against retroactive legislation and they may be held immediately applicable to pending cases." *Village of El Portal v. City of Miami Shores,* 362 So. 2d 275, 278 (Fla. 1978) (citing *Turner v. United States,* 410 F.2d 837 (5th Cir. 1969); *City of Lakeland v. Catinella,* 129 So. 2d 133 (Fla. 1961); *Grammer v. Roman,* 174 So. 2d 443 (Fla. 2d DCA 1965)); *see also City of Orlando v. Desjardins,* 493 So. 2d 1027, 1028 (Fla. 1986) ("If a statute is found to be remedial in nature, it can and should be retroactively applied in order to serve its intended purposes.").

As will be discussed, we find that section 406.135 is remedial and reject the argument advanced by Campus that its retroactive application does abrogate or impair a vested right.

Section 406.135 Is Remedial

One of the primary purposes of enacting remedial legislation is to correct or remedy a problem or redress an injury. *See Roberts v. Butterworth,* 668 So. 2d 580 (Fla.

1996); *Desjardins; St. John's Village I, Ltd. v. Department of State, Div. of Corps.*, 497 So. 2d 990, 993 (Fla. 5th DCA 1986) ("By definition, a remedial statute is one which confers or changes a remedy; a remedy is the means employed in enforcing a right or in redressing an injury.") (citing *Grammer*). Specifically, in the context of disclosure of public records, the remedy sometimes lies in "mitigating the harsh provisions of the Florida Public Records Act. . . . " *Desjardins,* 493 So. 2d at 1029.

In *Desjardins,* for example, the City of Gainesville was sued by the plaintiff who claimed that he sustained injuries in an automobile accident caused by the City's negligent inspection and maintenance of a traffic signal. The plaintiff served upon the City a request to produce its litigation file under the Public Records Act. The City declined the request, arguing that the file was protected by the work product rule and the attorney-client privilege. The trial court entered an order requiring the City to produce the file and refused to retroactively apply the statutory exemption of section 119.07(3)(o), Florida Statutes, which exempted from disclosure the work product of the government's attorneys. The trial court refused to apply the exemption because the statute was enacted after the cause of action accrued. The Florida Supreme Court held that it was error not to apply the statute retroactively because it was enacted to remedy "the imbalanced posture and the disadvantaged status of public entities involved in litigation under the Public Records Act" prior to enactment of the exemption contained in the statute. *Desjardins,* 493 So. 2d at 1029. Moreover, the court noted that the legislative history of the statute recognized the courts' concern over this problem and the need for "legislative resolution of the matter." *Id.*

In *Roberts,* a defendant sought disclosure of all public records held by the Attorney General's Office related to himself. He appealed after the trial court found the records sought either were not public records or were exempt under the work product rule. On appeal, the defendant argued that the trial court erred in applying the statutory capital collateral litigation work product exemption retroactively to a public records request that pre-dated the effective date of the new exemption. The supreme court rejected this argument and held:

> Even though this particular provision did not take effect until October 1, 1995, the legislative history indicates that the statute is remedial in nature and thus can be applied retroactively. *See City of Orlando v. Desjardins,* 493 So. 2d 1027 (Fla. 1986) (holding that statutory work product exemption in chapter 119 was remedial in nature and thus applicable to cause of action that accrued prior to its effective date).

Roberts, 668 So. 2d at 581-82 (footnote omitted). The court noted that the Legislature had justified making the statute remedial on the grounds that the "'premature disclosure of this information could be detrimental to the Attorney General's legal representation in these proceedings'" and "'the public harm in disclosing this work product significantly outweighs any public benefit derived from disclosure.'" 668 So. 2d at 582 n.5 (quoting ch. 95-398, §17, at 3266, Laws of Fla.).

Similarly, the Legislature perceived the public necessity to correct the problems associated with public dissemination of autopsy photographs, especially over the Internet. Finding that this sort of public display of a decedent's remains is not only injurious to the family

members of the decedent, but morally reprehensible and anathema to the citizens of Florida, the Legislature enacted section 406.135 to mitigate the harsh provisions of the Act that would allow public disclosure of such records. Realizing the necessity for *immediate* resolution of this problem, the Legislature declared that "the exemption provided in this act should be given retroactive application because it is remedial in nature." Ch.2001-1, §2, at 2, Laws of Fla.[6]

Campus argues, however, that labeling a statute remedial does not necessarily mean that it should be automatically applied retroactively if it impairs vested rights, creates new obligations, or imposes new penalties. We find language in *Chase Federal, Laforet,* and *Arrow Air* that supports this argument. *See also Catinella.* Therefore, because Campus contends that section 406.135 abrogates Campus's vested right to inspect and copy the autopsy photographs, we will next consider whether retroactive application of the statute should be prohibited on this ground.

---

[6] The evidence and testimony contained in the record in the instant case confirm the need for this remedial exemption. The trial court took judicial notice that numerous websites exist that display autopsy photographs. The record in the instant case also includes graphic and disturbing autopsy photographs of NASCAR drivers Neil Bonnett and Rodney Orr which were published on Mr. Uribe's website the day before chapter 2001-1 became law. Mr. Bonnett's daughter and Mr. Orr's father testified about the emotional distress caused by the publication and viewing of the autopsy photographs of their father and son and Mrs. Earnhardt testified concerning the emotional distress that would result from even the potential publication or public viewing of her deceased husband's autopsy photographs.

Retroactive Application Of Section 406.135
Does Not Abrogate A Vested Right

The courts have been loath to formulate a definition of "vested right" that can be applied in all cases with precision and certainty. A general definition is found in *City of Sanford v. McClelland,* 163 So. 513 (Fla. 1935), wherein the court held that "[a] vested right has been defined as 'an immediate, fixed right of present or future enjoyment' and also as 'an immediate right of present enjoyment, or a present, fixed right of future enjoyment.'" *Id.* at 514-15 (citing *Pearsall v. Great N. Ry. Co.,* 161 U.S. 646 (1896)). "'[T]o be vested a right must be *more than a mere expectation based on an anticipation of the continuance of an existing law;* it must have become a title, legal or equitable, to the present or future enforcement of a demand,. . . . '" *Division of Workers' Comp., Bureau of Crimes Comp. v. Brevda,* 420 So. 2d 887, 891 (Fla. 1st DCA 1982) (emphasis supplied) (quoting *Aetna Ins. Co. v. Richardelle,* 528 S.W.2d 280, 284 (Tex. Civ. App. 1975)); *see also Lamb v. Volkswagenwerk Aktiengesellschaft,* 631 F. Supp. 1144, 1449 (S.D. Fla. 1986); *Clausell v. Hobart Corp.,* 515 So. 2d 1275, 1276 (Fla. 1987), *cert. denied,* 485 U.S. 1000 (1988); *In re Will of Martell,* 457 So. 2d 1064, 1068 (Fla. 2d DCA 1984) ("To be vested, a right must be more than a mere expectation based on anticipation of the continuance of an existing law. . . . ") (citation omitted).

We are here concerned with the concept of vested rights in the context of the constitutional proscription against retrospective application of legislation. Within this context, a vested right is a "fixed" right that cannot be abrogated or taken away without violation of the possessor's right to due process. *See Chase Federal,* 737 So. 2d at 503 ("Generally, due process considerations prevent the

State from retroactively abolishing vested rights.") (citation omitted). The vested right claimed by Campus is the right to inspect and copy the autopsy photographs of Mr. Earnhardt. We disagree that this is a vested right for two reasons: 1) the right to inspect and copy public records is a right subject to divestment by enactment of statutory exemptions by the Legislature; and 2) the rights provided under the Public Records Act are public rights.

While the Public Records Act grants to Florida citizens the right to inspect and copy public records, "the legislature also has the prerogative to place reasonable restrictions on that right." *Henderson,* 745 So. 2d at 326 (citation omitted). We, therefore, begin our analysis by noting that all public records are subject to public inspection and copying *unless* the records fall within a specific statutory exemption enacted by the Legislature. Both the Florida Constitution and the Public Records Act specifically allow for the creation of exemptions. Article I, section 24(c) of the Florida Constitution provides in pertinent part that "[t]he legislature, however, may provide by general law for the exemption of records from the requirements of subsection (a)." Section 119.15(4)(b), Florida Statutes (2001), similarly provides in pertinent part that "[a]n exemption may be created or maintained." Thus both the Florida Constitution and the Public Records Act declare that the right to inspect and copy public records is a right subject to divestment by legislative enactment. Hence, the right claimed by Campus to view the autopsy photographs is not a "fixed" right and thus it is not a vested right within the context of the constitutional prohibition against retroactive application of legislation. Rather, it is more akin to "an expectation based on an anticipation of the continuance of an existing law" with the "existing law"

being the Public Records Act, and the "anticipation" being the maintenance of the current provisions of the Act unchanged by the Legislature's enactment of exemptions.

In *State v. White,* 194 So. 2d 601 (Fla. 1967), for example, the Legislature enacted a statute that exempted certain motor carriers from having to obtain a certificate of public convenience and necessity from the Public Service Commission. The Legislature subsequently enacted a statute that eliminated this exemption, thereby imposing on carriers the requirement that they obtain a certificate. The defendant, who apparently had been a carrier prior to the enactment of the subsequent statute, was charged, after the statute went into effect, with transporting property on the public highways without the required certificate. The defendant claimed that the subsequent statute was unconstitutional and that the charges against him should be dismissed. The court disagreed and held that "[i]t is in accord with well recognized law and principle that [defendant] did not receive by virtue of any law or circumstance an absolute vested right to continue the operation in question without limitation or the legal possibility of subsequent abrogation." *Id.* at 603. Likewise, we conclude that Campus did not obtain by virtue of the Public Records Act or the Florida Constitution a vested right to copy or view the autopsy photographs of Mr. Earnhardt because the right was limited by "the legal possibility of subsequent abrogation."

Moreover, the Florida courts have consistently recognized that the right to inspect and copy public records

under the Public Records Act is a public right.[7] The United States Supreme Court has held that for purposes of determining whether it is appropriate to allow retroactive application of a statute, only private, and not public rights, may become vested in this constitutional sense. *Hodges v. Snyder,* 261 U.S. 600 (1923). In *Hodges,* the plaintiffs, as resident taxpayers, brought suit challenging the validity of a consolidated school district which had been organized by the merger of several smaller districts. The lower court held that the attempted organization of the consolidated school district was not authorized by law and entered judgment holding the consolidation invalid. Thereafter, the Legislature enacted a statute legalizing and validating all proceedings relating to the consolidated school district. The issue presented to the Court was whether retroactive application of the new statute deprived the plaintiffs of a vested right without due process. The Court recognized the general rule that private rights which have been vested by a judgment cannot be taken away by subsequent

---

[7] *See Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.,* 784 So. 2d 438 (Fla. 2001); *Allen v. Butterworth,* 756 So. 2d 52, 65 (Fla. 2000) ("This Court has recognized that 'chapter 119 grants a substantive right to Florida citizens,' on which the Legislature 'has the prerogative to place reasonable restrictions.' ") (quoting *Henderson v. State,* 745 So. 2d 319, 326 (Fla. 1999)); *Henderson,* 745 So. 2d at 328 n. 5 ("In interpreting article I, section 24 of the Florida Constitution, we have stated that 'public officials must conduct public business in the open and . . . public records must be made available to all members of the public.' ") (quoting *State ex rel. Clayton v. Board of Regents,* 635 So. 2d 937, 938 (Fla. 1994)); *Housing Auth. of City of Daytona Beach v. Gomillion,* 639 So. 2d 117, 121 (Fla. 5th DCA 1994) ("It is the policy of . . . the Florida Public Records Act . . . that the records of public bodies should be accessible to the public absent a clear and specific exemption from disclosure.").

legislation. The Court held, however, that the rule against retroactive application of legislation does not apply to public rights, citing *In re Clinton Bridge,* 77 U.S. 454 (1870), and *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 59 U.S. 421 (1855). The Court held that the right claimed by the plaintiff was a public right and therefore could not be considered a vested right for purposes of preventing retrospective application of the statute. The Court explained:

> It is true that, as they contend, the private right of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation.
>
> This rule, however, as held in the Wheeling Bridge Case, does not apply to a suit brought for the enforcement of a public right, which, even after it has been established by the judgment of the court, may be annulled by subsequent legislation and should not be thereafter enforced; although, in so far as a private right has been incidentally established by such judgment, as for special damages to the plaintiff or for his costs, it may not be thus taken away. . . .
>
> In the Wheeling Bridge Case, as in the Clinton Bridge Case, the public right involved was that of abating an obstruction to the navigation of a river. The right involved in the present suit, of enjoining the maintenance of an illegal school district and the issuance of its bonds, is likewise a public right shared by the plaintiffs with all other resident taxpayers. And while in the Wheeling Bridge Case the bill was filed by the State, although partly in its proprietary capacity

> as the owner of certain canals and railways, the doctrine that a judgment declaring a public right may be annulled by subsequent legislation, applies with like force in the present suit, although brought by individuals primarily for their own benefit; the right involved and adjudged, in the one case as in the other, being public, and not private.

261 U.S. at 603-04 (citations omitted).

Like the Court in *Hodges,* the Florida Supreme Court, in *Chase Federal,* held that due process considerations prevent the retroactive application of a statute when vested rights are abrogated. The Florida courts have consistently held that due process protects private rights. *J.B. v. Florida Dep't of Children & Family Servs.,* 768 So. 2d 1060 (Fla. 2000); *Department of Law Enforcement.*[8]

---

[8] As explained by the court in *Department of Law Enforcement*:

> The basic due process guarantee of the Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const. Substantive due process under the Florida Constitution protects the full panoply of *individual rights* from unwarranted encroachment by the government. . . .
>
> > . . . Procedural due process under the Florida Constitution guarantees to every citizen the right to have that course of legal procedure which has been established in our judicial system for the protection and enforcement of *private rights.*

Department of Law Enforcement, 588 So. 2d at 960 (emphasis supplied) (citations omitted) (quoting *State ex rel. Gore v. Chillingworth,* 171 So. 649, 654 (Fla. 1936) (citations omitted)); *see also Miller v. Nolte,* 453 So. 2d 397, 401 (Fla. 1984) ("Persons have a right to due process when the protection and enforcement of their private rights are at issue.")

(Continued on following page)

We find that the choice of due process as the abiding constitutional principle that dictates the resolution of issues relating to the prohibition of retroactive legislation that abrogates a vested right adds currency to the general principle adopted in *Hodges* and numerous courts in other jurisdictions that the prohibition does not apply to public rights.[9]

If we were to accept the argument advanced by Campus that once a public record is created, a member of the public has a vested right to inspect and copy it, we would have to conclude that a statute that establishes an exception to the Public Records Act may never be applied retroactively. Adoption of such a rule would eliminate the Legislature's ability to enact remedial legislation to immediately resolve problems caused by public disclosure and to mitigate the sometimes harsh provisions of the Public Records Act. Moreover, adoption of such a rule would require us to ignore decisions of the courts of this state that have given retroactive application to such statutory exemptions. *See Roberts; Desjardins.* This we

---

(citing *Fuentes v. Shevin,* 407 U.S. 67 (1971); *Goldberg v. Kelly,* 397 U.S. 254 (1970)).

[9] *Mendly v. County of Los Angeles,* 28 Cal. Rptr. 2d 822 (Cal. Ct. App. 1994); *Van de Kamp v. Gumbiner,* 270 Cal. Rptr. 907 (Cal. Ct. App. 1990); *Robinson v. City of Winfield,* 219 P. 273 (Kan. 1923); *Holen v. Minneapolis-St. Paul Metro. Airports Comm'n,* 84 N.W.2d 282 (Minn. 1957); *Yow v. Tishomingo County Sch. Bd.,* 172 So. 303 (Miss. 1937); *Becker v. Adams,* 181 A.2d 349 (N.J. 1962); *Bradford v. Suffolk County,* 15 N.Y.S.2d 353 (N.Y. App. Div. 1939), *judgment affirmed as modified,* 28 N.E.2d 932 (N.Y. 1940); *Jackson County v. Jackson Educ. Serv. Dist.,* 752 P.2d 1224 (Or. Ct. App.), *review denied,* 758 P.2d 346 (Or. 1988); *Inman v. Railroad Comm'n,* 478 S.W.2d 124 (Tex. App. 1972); *Leuch v. Egelhoff,* 51 N.W.2d 7 (Wis. 1952).

cannot do. Hence we reject the argument advanced by Campus that retroactive application of section 406.135 abrogates a vested right.

The last issue we must address is whether the trial court erred in finding that Campus failed to establish good cause under section 406.135.

Good Cause

Campus argues that even if section 406.135 is constitutional, the trial court erred in finding that Campus failed to establish good cause for release of the photographs. The statute requires consideration of the following factors in determining good cause: 1) whether disclosure is necessary so that the public can evaluate the government's performance; 2) the seriousness of the intrusion into the family's right to privacy; 3) whether disclosure is the least intrusive method available; and 4) the availability of similar information in other public records, regardless of form. § 406.135(2)(a), Fla. Stat. (2001).

As to the first factor, while the public obviously has a great interest in making certain its government, the medical examiner in the instant case, carries out its duties in a responsible fashion, that interest cannot be served by viewing the autopsy photographs of Mr. Earnhardt because the uncontradicted testimony establishes that the photographs are not of diagnostic quality. Moreover, the testimony further establishes that there is nothing that can be discerned from the photographs that is not contained in the autopsy report and other materials that have been released to Campus and the public. If it cannot be determined from the photographs that the cause of death was anything other than what the medical examiner

concluded, the photographs will not aid in assuring that the government is performing up to the required standard. Regarding the argument advanced by Campus that the photographs are needed to evaluate NASCAR safety requirements, the trial court found, and we agree, that the safety requirements of NASCAR, a private entity, do not implicate the public's interest in evaluating governmental performance sufficient to release the photographs.

The second factor weighs very heavily in favor of nondisclosure. The medical examiner testified that the photographs were "gruesome, grisly and highly disturbing," and the physician attending Mr. Earnhardt after the accident confirmed this. The trial court found that such publication would "be an indecent, outrageous, and intolerable invasion, and would cause deep and serious emotional pain, embarrassment, humiliation and sadness to Dale Earnhardt's surviving family members." It is evident from our review of the record that the publication of the nude and dissected body of Mr. Earnhardt would cause his wife and children pain and sorrow beyond the poor power of our ability to express in words.

Regarding the third factor, the trial court found that there were no less intrusive means available for preventing trauma to the Earnhardt family. Campus argues that inspection alone would not cause a serious intrusion into the privacy rights of the Earnhardt family. However, the trial court rejected this argument, finding that the mere knowledge that the photographs would be accessible for inspection was the cause of overwhelming distress to the Earnhardt family.

The fourth factor also weighs in favor of nondisclosure. As we previously stated, the autopsy report and

other information was made available to the public and, given the poor quality of the photographs and the fact that they were only made as a back-up to the medical examiner's dictation system, disclosure of the photographs would reveal nothing that is not contained in the autopsy records that were released.

The standard of review regarding issues of good cause requires us to determine whether the trial court abused its discretion in making its decision. *See Palokonis v. EGR Enters. Inc.*, 652 So. 2d 482 (Fla. 5th DCA 1995); *Williams v. Estate of Williams*, 493 So. 2d 44 (Fla. 5th DCA 1986). Based on our thorough review of the record in the instant case and our analysis of this issue, we conclude that the trial court did not abuse its discretion in finding that Campus failed to establish good cause under section 406.135.

Conclusion

The Florida Constitution gives every citizen the right to inspect and copy public records so that all may have the opportunity to see and know how the government functions. It is also a declared constitutional principle that every individual has a right of privacy, and while our constitution does not catalogue every matter that one can hold as private, autopsy photographs which display the remains of a deceased human being is certainly one of them. But we need not say so because the Legislature has said so and that is its prerogative, not ours. Thus our function here has not been to weigh these two constitutional rights with respect to autopsy photographs and determine whether the right that helps ensure an open government freely accessible by every citizen is more

significant or profound than the right that preserves individual liberty and privacy. Rather, our function has been to determine whether the Legislature has declared that the latter prevails over the former in a manner that is consistent with the constitutional provisions that bestow upon it the power to do so. We have fulfilled our judicial responsibility in this matter by determining whether section 406.135 was constitutionally enacted and whether it was properly applied under the facts and circumstances of the instant case. Having concluded that it was, we affirm the judgment under review.

We conclude our judicial responsibility by certifying to the Florida Supreme Court the following questions to be of great public importance:

1. IS SECTION 406.135 CONSTITUTIONAL?

2. IF SECTION 406.135 IS CONSTITUTIONAL, SHOULD IT BE APPLIED RETROACTIVELY?

AFFIRMED; QUESTIONS CERTIFIED.

PETERSON and GRIFFIN, JJ., concur.

29 Media L. Rep. 2173

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

TERESA EARNHARDT and the Estate of DALE EARNHARDT, by and through its personal representative, TERESA EARNHARDT, for and on Behalf of The Estate and for the Survivors,

Plaintiffs,

vs.

VOLUSIA COUNTY, OFFICE OF THE MEDICAL EXAMINER,

Defendant. /

CASE NO.: 2001-30373-CICI
DIVISION 31

FINAL JUDGMENT, FINDINGS OF FACT AND CONCLUSIONS OF LAW

A non-jury trial was conducted before the court from June 11 through 13, 2001. Appearances were entered by or on behalf of:

- The plaintiffs, including Teresa Earnhardt, Dale Earnhardt's widow; Taylor Earnhardt, their twelve-year old daughter; Dale Earnhardt, Jr., Dale Earnhardt's adult son (collectively, the "Earnhardt family"); and Dale Earnhardt, Incorporated;

- The defendant, County of Volusia;
- The intervener, the Solicitor General on behalf of the Attorney General and the State of Florida;
- The intervener, Orlando Sentinel Communications Company;
- The intervener, Campus Communications, Inc.;
- The individual intervener, Mr. Michael Uribe;
- The Honorable Jeb Bush, the Governor of the State of Florida, submitted a memorandum of law and a memorandum of law and argument were submitted by the First Amendment Foundation, the Florida Society of Newspaper Editors, and The Reporters' Committee for Freedom of the Press, all of whom appeared as *amici curiae*.

FINDINGS OF FACT

The court finds the following facts:

1. The court has before it a broad representation of the varied interests in both the dispute to obtain access to the autopsy photographs of Dale Earnhardt, and the legal controversy regarding the constitutionality of Florida Statute 2001-1. Any person or entity expressing an interest in intervention to the court was permitted to intervene to insure that as many divergent views as possible would be thoroughly presented. All persons and entities requesting access to the autopsy photographs of Dale Earnhardt have been advised of these proceedings by the court and have been afforded an opportunity to participate. It has

been this court's intention to liberally permit intervention so that all those with any interest in the autopsy photographs could be heard in this matter.

2. This action began as a petition for temporary and permanent injunctive relief against the defendant, Volusia County Medical Examiner, seeking the sealing of the autopsy photographs of the late Dale Earnhardt.

3. Mr. Earnhardt was a well-known racecar driver who died as result of an accident in a race held at Daytona International Speedway on February 18, 2001.

4. Mr. Earnhardt was pronounced dead at Halifax Medical Center in Daytona Beach, Volusia County. In accordance with Florida law governing accidental deaths, an autopsy was performed at the office of the Volusia County Medical Examiner on February 19, 2001.

5. Thirty-three (33) photographs were taken during the autopsy by the Assistant Medical Examiner. A catalog of those photographs has been admitted into evidence.

6. The autopsy photographs are not of diagnostic quality. The Medical Examiner testified that the autopsy photographs were completed in accordance with the Medical Examiner's normal practice. They were taken solely and exclusively as a backup to the dictation system, so the physician could refer to them to refresh his recollection in the event any portion of the dictation was lost and the report had to be re-dictated. Once that dictation was memorialized by the official report, the autopsy photographs became inconsequential and were of no further use to the Medical Examiner's office.

7. Information concerning the results of this particular autopsy was promptly and properly made accessible to

the public by the Medical Examiner. That information included photographs of the wrecked race car in which Mr. Earnhardt died, the written report of the autopsy including a sketch showing the markings on Mr. Earnhardt's body, a toxicology report, an extensive description of Mr. Earnhardt's injuries, and data about Mr. Earnhardt's physical condition. That report and the remainder of the Medical Examiner's file on this autopsy, with the exception of the autopsy photographs, have been widely available to the public.

8. Mrs. Earnhardt filed this action on February 22, 2001. A temporary injunction was entered *ex parte* on that same date enjoining the Medical Examiner from releasing the autopsy photographs and affording Mrs. Earnhardt an opportunity to assert her family's right to privacy.

9. On February 23, 2001, a request for access to the autopsy photographs was made by the Orlando Sentinel. It was denied by the Medical Examiner in compliance with the temporary injunction. Michael Uribe requested the photographs shortly thereafter and was similarly denied. The Orlando Sentinel and Uribe were both granted leave to intervene in the present cause. The Orlando Sentinel was joined by a myriad of media interests,[1] all of which were represented by counsel for the Orlando Sentinel [hereinafter the Sentinel Group]. A later request for access to the autopsy photographs was made by Campus Communications, Inc., which was similarly granted leave to

[1] Orlando Sentinel Communications Company, Media General Operations, Inc., Media General Broadcasting, Inc. d/b/a WFLA-TV Channel 8, Miami Herald Publishing Co., the Tribune Company, and the Los Angeles Times

intervene. All requests for access to the photographs were properly denied by the County of Volusia.

10. Court-ordered mediation was conducted with the plaintiffs, the Medical Examiner, the Orlando Sentinel, and Michael Uribe. A partial settlement of the case was reached among the plaintiffs, the Medical Examiner, and the Sentinel group. Neither Campus Communications, nor Uribe participated in the mediated settlement.

11. Under the terms of the mediated settlement agreement the autopsy photographs and the autopsy report were examined and evaluated by a medical doctor who is also reputed to be an expert in biomechanics, Barry Myers, M.D., of Duke University. Dr. Myers was selected by the mediator, John Upchurch, Esquire, who was appointed as a special master by consent of the parties to the mediation agreement. Dr. Myers rendered a detailed written report of his findings as the mediator had directed him. It included his assessment of the Earnhardt autopsy as it related to the mechanical cause of Mr. Earnhardt's death; i.e., whether the cause of death, a basilar skull fracture, was the result of a head whip or of striking the steering wheel, and whether there had been a blow to the top of the head. That report is in the record in this case and has been made available to the public. Dr. Myers does not refer to the autopsy photographs in his report.

12. The uncontroverted testimony of the Medical Examiner in this cause demonstrates that autopsy photographs vividly and graphically depict decedents' bodies in various positions and in various degrees of dissection, as one would expect during the course of a complete autopsy. The Medical Examiner testified that autopsy photographs are gruesome and would be upsetting to many people. He

further agreed that he would not share autopsy photographs with his teenaged daughter. The catalog of the autopsy photographs in the present case provides a graphic descriptive list of the specific photographs, which are consistent with the typical autopsy. The autopsy photographs are without question gruesome, grisly, and highly disturbing to a person of ordinary and normal sensibilities.

13. The release of the autopsy photographs to any members of the public could result in immediate, widespread dissemination of these disturbing images, including posting on the world wide web.

14. There are numerous web sites which specialize in posting gruesome, grisly and disturbing images of dead or severely injured persons, as well as autopsy photographs. Some of these websites are findadeath.com, choosedeath.com and websitecity.com. It is a virtual certainty that these particular autopsy photographs would be posted on one or more of these web sites for immediate, worldwide viewing if they became publicly available.

15. The intervener, Mr. Uribe, has already published autopsy photographs of Neil Bonnett and Rodney Orr, two racecar drivers who died in accidents at the Daytona International Speedway, on his web site, websitecity.com. Relatives of those decedents testified in the present proceeding. The court recognizes that not only the publication of their loved ones' autopsy photographs on the internet, but also the knowledge that these photographs are available to the public for unnecessary perusal caused overwhelming personal distress and trauma to them and their families. It was clear from their testimony, and the testimony of Teresa Earnhardt, that it is the unnecessary

inspection itself – not necessarily the frequency with which it occurs – that constitutes the gravamen of the injury to a family. The witnesses in this case were obviously shocked by the use of the World Wide Web, but they also felt significantly invaded by unnecessary inspection on a more limited scale. The character of this particular injury is such that unwarranted invasions of the family's privacy, regardless of the frequency, leave a scar.

16. The publication of a person's autopsy photographs constitutes a unique, serious, and extraordinarily intrusive invasion of the personal privacy of that person's surviving family members, particularly their children, parents, and spouse. The wide viewing of such personal and painful photographs by people all over the world who are strangers to the family will cause serious pain, anxiety, worry, and discomfort to the family members. The availability of such photographs on the web makes the dissemination of the photographs very easy for anyone with access to a computer modem. That knowledge alone would cause continuous pain and anxiety to the family and prolong their suffering.

17. The court specifically finds that examination of these autopsy photographs by any means would be an indecent, outrageous, and intolerable invasion, and would cause deep and serious emotional pain, embarrassment, humiliation and sadness to Dale Earnhardt's surviving family members.

18. There has been no reason presented in this case to suggest that an examination or copying of the subject autopsy photographs would be helpful in any degree whatsoever in evaluating the performance or accountability of the government. The hypotheses relating to NASCAR racing

safety raised by the interveners do not meaningfully implicate governmental accountability. While there may be a number of *private* interests implicated, the suggestion of a controversy within NASCAR by the interveners certainly does not implicate a *governmental* interest. Those issues offered for the consideration of the court were thinly veiled excuses to gain access to the court either for the purpose of arguing the constitutionality of the statute or for making a profit at the expense of this family. They are strained arguments and are entirely too tenuous for realistic discussion.

19. Similar information about Mr. Earnhardt's autopsy remains available to the public through the autopsy report, the other materials in the Medical Examiner's file (including body diagrams and sketches), and Dr. Myers' report. According to the testimony herein, the autopsy photographs merely depict the same information contained in the thorough written materials described above. Dr. Bohanan, Dale Earnhardt's treating physician at the time of his demise, reviewed the autopsy photographs and testified in conformity with the Medical Examiner that these particular autopsy photographs simply do not provide any additional useful information.

20. The evidence in this case clearly demonstrates that the examination of the autopsy photographs by the interveners or other members of the general public, even if no reproduction were allowed, would constitute a violation of the Earnhardt family's right to privacy of the highest order. Viewing of the photographs would be disturbing, humiliating, and painful, and would result in a violation of the right of privacy of the members of the Earnhardt family.

CONCLUSIONS OF LAW

While the temporary injunction in this case was in place, but before the final hearing on the prayer for permanent injunction had been scheduled, the Florida Legislature adopted Chapter 2001-1. The new law was quite obviously intended for application in the present case. Before the new law was adopted, the plaintiffs simply sought a temporary and permanent injunction enjoining the Medical Examiner from permitting the examination and copying of a specific set of autopsy photographs. The plaintiffs argued a legal theory to the effect that there is a disclosural right of privacy arising under Article 1, Section 23, of the Florida Constitution and the Fourteenth Amendment to the United States Constitution. The plaintiffs argued that this common law right of privacy would extend to protect the disclosure of autopsy photographs because that right is superior to, and would preempt, the Public Records Law. The adoption of the new law changed the procedural and substantive character of the present litigation in midstream. The plaintiffs continued to seek permanent injunctive relief under their legal theory regarding the disclosural right of privacy arising under Article 1, Section 23, of the Florida Constitution and the Fourteenth Amendment to the United States Constitution. But, they concurrently sought relief under Chapter 2001-1, which this court has construed to also be a proceeding injunctive in nature. Campus Communications and Uribe sought a declaration of the unconstitutionality of Chapter 2001-1 and a finding contrary to the plaintiffs on the common law right of disclosural privacy. The County of Volusia and the State of Florida sought a declaration that the new statute is constitutional and that there is no common law disclosural privacy right which would serve

to impede the application of the Public Records Law, as it existed prior to the adoption of Chapter 2001-1.

The court first heard argument from all parties and *amici curiae* regarding the constitutionality of Chapter 2001-1 in order to frame the issues for the evidentiary portion of the case.

This case involves a collision of cataclysmic proportion between two extremely valuable rights and their zealous proponents. Modern times have witnessed an erosion of the individual expectation of privacy to a pathetic point. We live in a world in which the individual can anticipate that everything from one's market habits to one's personal health (and everything in-between) are known to anyone with the electronic capacity to eavesdrop. The curiosity of the public combined with the need of the commercial marketers and the media to feed a sated population with an increasingly sensational daily product have led to a substantially unhealthy environment. Nosiness has become the order of the day – so long as it is amusing or entertaining. Our society has tacitly accepted a standard that permits invasions of privacy of gross dimension, and we have become forgetful of some very basic concepts. Foremost among them is the simple notion that many things are nobody else's business. We are entitled to be let alone; to have our private space – a space that is not subject to invasion by the uninvited. Chapter 2001-1 enthusiastically embraces this simple notion, as does this court. It is unfortunate that some private documents, such as autopsy photographs, must by their very nature come into the hands of the government thereby drawing another fundamental right – the right of the public to scrutinize its government – into conflict. The public records laws of the

State of Florida proudly embody the belief of all knowledgeable citizens that a government that operates openly is a better government than one that operates in secrecy. The public is encouraged to be interested in government and to personally inspect and copy whatever the government holds to insure that the government, and everyone within it, remains true to our ideals, or at least minimum standards, of governance.

In adopting the new law the legislature was wise in recognizing that autopsy photographs, of all things, should be presumptively private; that is, they will not be shared with the public, even though they are in the very public hands of the government, unless it can be established that good cause exists for their review in the course of conducting legitimate scrutiny of the government. Autopsy photographs are different in character than other documents retained by the government and, in spite of the sophisticated arguments in favor of their open release, they are the "business" of very few people. The judicial review built into Chapter 2001-1 to determine whether there is good cause to release autopsy photographs protects the public from the unjustified withholding of documents that may, indeed, reflect badly upon the government. It does not require a great imagination to conjure images of a governmental medical examiner or other official who would resist the release of autopsy documents to conceal misfeasance or malfeasance or to protect another. It is equally obvious that a governmental official ought to have the means to demonstrate that he or she is free of blame or fault when it is inappropriately suggested. The legislature has, thus, protected both interests with a balancing test that limits the scope of the public's inquiry to those circumstances in which the inquiry is legitimately engaged

for reasonably defined purposes. Article 1, Section 24, of the Florida Constitution permits the legislature to popularly define the scope of constitutional protection of the public records laws by creating exemptions. The legislature may only create such exemptions, however, if it states with specificity the public necessity justifying the exemption and creates an exemption no broader than necessary to accomplish the stated purpose of the law. The constitutional specificity requirement is easily met in the subject legislative enactment. The interveners, though, have asserted a reasonable question regarding the breadth of the exemption. It is suggested by the proponents of the public records laws that a more narrow exemption could possibly have been carved to keep it within constitutional parameters. It is argued that the scope could have been limited by legislatively permitting the examination of autopsy photographs and requiring good cause to copy them. After hearing the testimony in this case the court is convinced that the stated purpose of the legislation may not reasonably have been accomplished under such a scheme. There is a substantial injury to families when strangers are permitted *carte blanche* to go through their loved ones' autopsy photographs. In a decent society that should be recognized *per se*. The burden borne by those families subjected to this unnecessary cruelty is much greater than that to be borne under this new statute by those wishing to mind the business of others. It is just and fitting that those wishing to view the personal, private photographs of a family's loved one should give a decent explanation for doing so. We have completely lost our way when we begin seriously entertaining argument from people who believe it to be appropriate in our society to examine and/or publish other families' autopsy photographs – *autopsy photographs* – simply because they have

unfortunately found their way into the public record. While some may say the legislature did not do a perfect job in adopting this statute, this court is convinced it performed within its constitutional directives and is to be complimented for recognizing the privacy needs of its citizens.

While the court is tempted to adopt the argument of the plaintiffs regarding the federally protected right of privacy, the invitation is respectfully declined. The court does not believe that the constitutional right to privacy under the Fourteenth Amendment to the United States Constitution has evolved to the extent that a trial court of general jurisdiction can comfortably interpret it to reach the autopsy photographs here. The court does, however, recognize that such an interpretation is logically consistent with both existing precedent and the needs of the public and agrees in spirit with courts that have found their way to such a resolution. *See Florida v. Rolling,* 1994 WL 722891; 22 Med. L. Reporter 2264 (Fla. 8th Cir., No. 91-3832; July 27, 1004 [sic]). Better in this instance that the appellate court reach such a conclusion than a trial court capable of resolving the question on different grounds.

Accordingly, it is

ORDERED AND ADJUDGED that Chapter 2001-1 is a constitutionally valid enactment and may be properly given retroactive application. The legislature made abundantly clear its mandate that the statute shall be applied retroactively to requests for access made prior to its effective date. The court finds Chapter 2001-1 to be remedial and, therefore, concludes that the statute must be retroactively applied to the requests for the subject autopsy photographs. It is further

ORDERED AND ADJUDGED that the parties seeking examination and/or copying of the autopsy photographs have failed to satisfy their burden to demonstrate good cause as imposed by Chapter 2001-1, on a factual basis, and that the plaintiffs have overwhelmingly prevailed in the application of the balancing standard imposed by the statute. Judgment is hereby entered in favor of Teresa Earnhardt, Taylor Earnhardt, Dale Earnhardt, Jr., the State of Florida, Office of the Solicitor General, and the County of Volusia against the interveners, Michael Uribe and Campus Communications, Inc., with respect to the permanent injunction sought to enjoin access to the autopsy photographs of Dale Earnhardt and the declaratory relief sought. The County of Volusia is hereby permanently enjoined from permitting the examination or copying of the autopsy photographs of Dale Earnhardt by Michael Uribe and Campus Communications, Inc. The court declines to create any restrictions or stipulations under the statute for the viewing or copying of the autopsy photographs in view of the ruling herein that there shall be no disclosure of any degree whatsoever. This judgment does not favor Dale Earnhardt, Inc., in that Chapter 2001-1 does not protect a corporation from release of autopsy photographs. It is further

ORDERED AND ADJUDGED that the parties to the mediated settlement agreement shall be bound by their agreement and the court shall retain jurisdiction for the enforcement of that agreement in the event it becomes necessary. That agreement is not binding upon those who did not sign or otherwise agree to it. It is further

ORDERED AND ADJUDGED that the temporary injunction entered on February 20, 2001, is hereby dissolved and the bond posted by the plaintiffs is hereby released. It is further

ORDERED AND ADJUDGED that the County of Volusia has acted legally in all respects in the course of the present dispute. It is further

ORDERED AND ADJUDGED that the court shall reserve jurisdiction for the determination and assessment of costs and attorney's fees and for the enforcement of the present judgment, as necessary.

DONE and ORDERED in Daytona Beach, Volusia County, Florida, this 9th day of July, 2001.

/s/ Joseph G. Will
Joseph G. Will
Circuit Judge

CERTIFICATE OF SERVICE

True copies of the foregoing have been furnished to the following this 9th day of July, 2001:

/s/ Patti A. Trembley
Judicial Assistant

Dickson M. Lupo, Esquire
Judson Graves, Esquire
ALSTON & BIRD
Bank of America Plaza
101 South Tryon Street, Suite 4000
Charlotte, North Carolina 28280-4000

E. Thom Rumberger, Esquire
Ernest H. Eubanks, Jr., Esquire
RUMBERGER, KIRK & CALDWELL,
Signature Plaza, Suite 300
201 South Orange Avenue
Post Office Box 1873
Orlando, Florida 32802-1873

Jon L. Mills, Esquire
P.O. Box 2099
Gainesville, Florida
32602-2099

Parker D. Thomson,
Esquire
Carol A. Licko, Esquire
THOMSON, MURARO,
RAZOOK & HART
One Southeast Third
Avenue, 17th Floor
Miami, Florida 33131

Daniel D. Eckert, Esquire
County Attorney
123 West Indiana Avenue
Deland, Florida 32720-4613

Margaret E. Kozan, Esquire
HOLLAND & KNIGHT, LLP
200 South Orange Avenue
Suite 2600
Orlando, Florida 32801

David S. Bralow, Esquire
Florida Media Tribune
Company
633 North Orange Avenue
Orlando, Florida 32801

Thomas E. Warner, Esquire
Office of the Solicitor
General
The Capitol – PL02
Tallahassee, Florida
32399-1050

Michael Uribe
P.O. Box 0683
Deland, Florida 32721-0683

Thomas R. Julin, Esquire
HUNTON & WILLIAMS
Barclays Financial Center
1111 Brickell Avenue,
Suite 2500
Miami, Florida 33131-3136

Jonathan D. Kaney, Jr.,
Esquire
COBB, COLE & BELL
P.O. Box 2491
Daytona Beach, Florida
32115-2491

Richard J. Ovelmen,
Esquire
JORDEN, BURT, BOROS,
CICCHETTI, BERENSON
& JOHNSON, LLP
777 Brickell Avenue,
Suite 500
Miami, Florida 33131

Charles T. Canady, Esquire
General Counsel
Executive Office of the
Governor
Room 209, The Capitol
Tallahassee, Florida
32399-1050
Attorney for Jeb Bush,
Governor of Florida

IN THE CIRCUIT COURT,
OF THE SEVENTH JUDICIAL
CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

Case No. 2001-30373-CICI
Division 01
Judge: The Hon. Joseph G. Will

TERESA EARNHARDT and The Estate of DALE EARNHARDT, by and through its personal representative, TERESA EARNHARDT, for and on behalf of The Estate and for the Survivors,

Plaintiffs,

vs.

VOLUSIA COUNTY, OFFICE OF THE MEDICAL EXAMINER,

Defendant.

Order Denying Motion for New Trial

This cause came before the Court on the motion of Campus Communications, Inc. for a new trial on the basis of the court's exclusion of Campus Communications' exhibits 1 through 77. The excluded exhibits consist primarily of newspaper articles.

The Court has considered the motion, the arguments of counsel for the parties, and otherwise has been duly advised. It is ordered and adjudged that the motion

is denied. Done and ordered in chambers at Daytona Beach, Volusia County, Florida.

/s/ Joseph G. Will 7/26/01
Joseph G. Will
Circuit Judge

Copies furnished to
all counsel of record.

Supreme Court of Florida

TUESDAY, JULY 1, 2003

CASE NO.: SC02-1635
Lower Tribunal No.: 5D01-2419

CAMPUS COMMUNICATIONS, INC.	vs. TERESA EARNHARDT, ET AL.
Petitioner(s)	Respondent(s)

This cause having heretofore been submitted to the court on Certified Great Public Importance pursuant to Article V, Section 3(b), Florida Constitution (1980), and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v), and the Court having determined that it should decline to exercise jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d).

LEWIS, QUINCE, CANTERO and BELL, JJ., concur.
ANSTEAD, C.J., WELLS and PARIENTE, JJ., dissent.

A True Copy Test:

/s/ Thomas D. Hall [SEAL]
Thomas D. Hall
Clerk, Supreme Court

bh
Served:

HON. FRANK J. HABERSHAW, CLERK
LUCY DALGLISH
BRUCE D. BROWN
BRUCE W. SANFORD
MARK GOODMAN

GREGG LESLIE
D. PATRICIA WALLACE
THOMAS R. JULIN
MIKE HIESTAND
MICHAEL URIBE
ROBERT D. LYSTAD
DICKSON M. LUPO
JON L. MILLS
E. THOM RUMBERGER, JR.
MATTHEW JOHN CONIGLIARO
CAROL A. LICKO
DANIEL D. ECKERT
ERNEST H. EUBANKS
PARKER D. THOMSON
THOMAS E. WARNER
JUDSON GRAVES
HON. JOSEPH G. WILL, JUDGE
SANDRA K. WOLKOV
HON. DIANE M. MATOUSEK, CLERK
DAVID S. BRALOW
ENRIQUE D. ARANA
HEIDI HUGHES
JONATHAN D. KANEY, JR.
RICHARD J. OVELMAN
JORDEN BURT BOROS CICCHETTI
CHARLES T. CANADY
TIMOTHY EDD MCLENDON

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

United States Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Laws of Florida

Chapter 2001-1 (codified as Section 406.135, Florida Statutes)

An act relating to public records; providing an exemption from the public records law for photographs and video and audio recordings of an autopsy; providing an exemption for certain members of the immediate family, or a representative thereof, or a state or federal agency; prohibiting the

custodian of a photograph or video or audio recording of an autopsy from permitting any person to view or duplicate a photograph or video or audio, except pursuant to court order and under the direct supervision of the custodian or his or her designee; exempting criminal and administrative proceedings from the act; requiring certain persons to be parties in a request for access to a photograph or video or audio recording of an autopsy; providing penalties; providing for future legislative review and repeal; providing a finding of public necessity; providing a retroactive effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. (1) A photograph or video or audio recording of an autopsy in the custody of a medical examiner is confidential and exempt from the requirements of section 119.07(1) and s. 24(a), Art. I of the State Constitution, except that a surviving spouse may view and copy a photograph or video or listen to or copy an audio recording of the deceased spouse's autopsy. If there is no surviving spouse, then the surviving parents shall have access to such records. If there is no surviving spouse or parent, then an adult child shall have access to such records. A local governmental entity, or a state or federal agency, in furtherance of its official duties, pursuant to a written request, may view or copy a photograph or video or may listen to or copy an audio recording of an autopsy, and unless otherwise required in the performance of their duties, the identity of the deceased shall remain confidential and exempt. The custodian of the record, or his or her designee, may not permit any other person to view or copy such photograph or video recording or listen to or copy an audio recording without a court order. For the purposes of this section, the term "medical examiner" means any

district medical examiner, associate medical examiner, or substitute medical examiner acting pursuant to ch. 406, as well as any employee, deputy, or agent of a medical examiner or any other person who may obtain possession of a photograph or audio or video recording of an autopsy in the course of assisting a medical examiner in the performance of his or her official duties.

(2)(a) The court, upon a showing of good cause, may issue an order authorizing any person to view or copy a photograph or video recording of an autopsy or to listen to or copy an audio recording of an autopsy and may prescribe any restrictions or stipulations that the court deems appropriate. In determining good cause, the court shall consider whether such disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form. In all cases, the viewing, copying, listening to or other handling of a photograph or video or audio recording of an autopsy must be under the direct supervision of the custodian of the record or his or her designee.

(2)(b) A surviving spouse shall be given reasonable notice of a petition filed with the court to view or copy a photograph or video recording of an autopsy or a petition to listen to or copy an audio recording, a copy of such petition, and reasonable notice of the opportunity to be present and heard at any hearing on the matter. If there is no surviving spouse, then such notice must be given to the deceased's parents, and if the deceased has no living parent, then to the adult children of the deceased.

(3)(a) Any custodian of a photograph or video or audio recording of an autopsy who willfully and knowingly violates this section commits a felony of the third degree, punishable as provided in section 775.082, section 775.083, or section 775.084, Florida Statutes.

(b) Any person who willfully and knowingly violates a court order issued pursuant to this section commits a felony of the third degree, punishable as provided in section 775.082, section 775.083, or section 775.084, Florida Statutes.

(c) A criminal or administrative proceeding is exempt from this section, but unless otherwise exempted, is subject to all other provisions of Chapter 119, Florida Statutes, provided however that this section does not prohibit a court in a criminal or administrative proceeding upon good cause shown from restricting or otherwise controlling the disclosure of an autopsy, crime-scene, or similar photograph or video or audio recordings in the manner prescribed herein.

(4) This exemption shall be given retroactive application.

(5) The exemption in this section is subject to the Open Government Sunset Review Act of 1995 in accordance with section 119.15, Florida Statutes, and shall stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that it is a public necessity that photographs and video and audio recordings of an autopsy be made confidential and exempt from the requirements of section 119.07(1), Florida Statutes, and Section 24(a) of Article I of the State Constitution. The

Legislature finds that photographs or video or audio recordings of an autopsy depict or describe the deceased in graphic and often disturbing fashion. Such photographs or video or audio recordings may depict or describe the deceased nude, bruised, bloodied, broken, with bullet or other wounds, cut open, dismembered, or decapitated. As such, photographs or video or audio recordings of an autopsy are highly sensitive depictions or descriptions of the deceased which, if heard, viewed, copied or publicized, could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injury to the memory of the deceased. The Legislature notes that the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of autopsy photographs and video and audio recordings would subject the immediate family of the deceased to continuous injury. The Legislature further notes that there continue to be other types of available information, such as the autopsy report, which are less intrusive and injurious to the immediate family members of the deceased and which continue to provide for public oversight. The Legislature further finds that the exemption provided in this act should be given retroactive application because it is remedial in nature.

Section 3. This act shall take effect upon becoming a law, and shall apply to all photographs or video or audio recordings of an autopsy, regardless of whether the autopsy was performed before or after the effective date of the act.

Approved by the Governor March 29, 2001. Filed in Office Secretary of State March 29, 2001.

CODING: Words stricken are deletions; words underlined are additions.